NOV 5 1956
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1956

No. 551

JOSEPH D. NUNAN, JR.,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RICHARD J. BURKE and
J. BERTRAM WEGMAN,
Counsel for Petitioner,
60 Wall Street,
New York 5, New York.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented for Review	2
Constitutional Provision, Statutes and Regulations Involved	9
Statement of the Case	10
Argument	29
Conclusion	39
APPENDIX:	
Statutes and Regulations	40

Cases Cited

Adams v. Maryland, 347 U. S. 179	39
Blumberg v. U. S., 222 Fed. 2d 496, 500	6, 32
Bostwick v. U. S., 218 Fed. 2d 790, 794	6, 31
Demetree v. United States, 207 F. 2nd 892	34
Dupree v. U. S., 218 Fed. 2d 781, 784	6, 31
Holland v. United States, 348 U. S. 121	34
Olinger v. Commissioner of Internal Revenue, 234 Fed. 2d 823	6, 31
Smith v. United States, 348 U. S. 147, 195	30, 32
U. S. v. Brennan, 214 F. 2d 268	27
United States v. Riganto, 121 F. Supp. 158, 162	30
Warring v. U. S., 222 Fed. 2d 906	6, 30

Statutes Cited

	PAGE
Federal Rules of Criminal Procedure, Rule 37(b)	2
Internal Revenue Code of 1939 (26 U. S. C. 145(b)), Section 145(b)	10, 29
18 U. S. C., Sec. 3486	10, 27, 39
28 U. S. C., Sec. 1254	2
26 C. F. R.:	
Part 39, Sec. 39.22(a)-3	10, 13
Part 81, Sec. 81.10	10, 13
~~Part 81, Sec. 81.18~~	~~10~~

IN THE

Supreme Court of the United States

October Term, 1956

No.

JOSEPH D. NUNAN, JR.,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Joseph D. Nunan, Jr., respectfully prays that this Court issue its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Eastern District of New York convicting petitioner of income tax evasion for the calendar years 1946 to 1950, inclusive, the sentence imposed being imprisonment for five years on each count, to run concurrently, and a fine of $15,000. The defendant was enlarged on bail of $1,500 pending appeal. By order entered upon stipulation, the mandate of the Court below has been stayed pending ultimate disposition in this Court.

Opinion Below

The opinion of the court below, per Medina, C. J., has not yet been reported officially. It is printed in the record filed herewith in Vol. II of the Joint Appendix, pages 1168a through 1202a.

Jurisdiction

The judgment of the Court below was dated and entered on September 6, 1956.

By order dated October 4, 1956, Mr. Justice Harlan granted petitioner an extension of time until November 5, 1956 for the filing of this petition for a writ of certiorari.

Jurisdiction to review such judgment by such writ is conferred on this Court by Section 1254 of Title 28, United States Code, and is invoked pursuant thereto and Rule 37(b) of the Federal Rules of Criminal Procedure.

Questions Presented for Review

1. Especially in a case such as this at bar, which was made a political football in the period just before and during the election campaign in 1952, immediately after which the indictment was returned, which was brought to trial as a prelude to the election campaign in 1954, and again made the subject of political attacks nationally televised over all networks from the Republican National Convention in San Francisco during the latter part of August, 1956, which was followed shortly by the affirmance below, is it not an aberration of justice, repugnant to accepted standards of the administration of criminal law, that evidence calculated to inflame the jury and create intense prejudice against the defendant was allowed to be adduced and was submitted for consideration by the jury even though such putative evidence had no probative value in respect of the offense charged?

2. Do not the following several holdings of the opinion below do violence to established principles of law applicable to the trial of criminal cases in the Federal Courts, and thus require the exercise of the supervisory power of this Court to correct abuses?

(a) That guilt of tax evasion is sufficiently proven by evidence that a defendant in a particular year deposited in his bank account and expended sums of currency in excess of his reported income in that year, without a shred of proof (as distinguished from mere suspicion) that such currency derived from income in that year or that the defendant had any likely source of income in currency, and not only without a scintilla of proof to negate possession by the defendant of such currency at the start of the indictment period but on the contrary, in fact, with documentary verification by prosecution witnesses that the defendant had had an accumulation of funds prior thereto more than sufficient to account for all such currency expenditures and deposits.

(b) That a conviction of tax evasion may be sustained upon the speculation that the jury may perhaps have found that failure to include in reported income relatively very minor items received by checks or shares of stock were wilful omissions, with intent to evade and defeat tax, "even if the jury had been unable to agree" that the deposit and expenditure of currency came from unreported taxable income; and the submission thus to the jury of the evidence concerning the currency, with instruction that the jury could accept it as proof of tax evasion, without negating the defendant's explanation of a prior accumulation as its source and without proof of a likely source of such currency as current income, would not be prejudicial error.

(c) That although the testimony of the Revenue Agent demonstrated so far as material to the issue a verification of the defendant's explanation of the source of the claimed accumulation of currency, the prosecution may be said to have negated the defendant's explanation if the appellate Court deem some

of the details "fantastic", wherefore the whole explanation can be said to be self-refuting; thus, if to the Court defendant's explanation seem in some respects "fantastic", despite verification of its essential bases, the prosecution is thereby relieved of the burden of negating any prior accumulation or of establishing any likely source of currency income.

(d) That despite the testimony of the Revenue Agent that certain specific items of income had in fact been reported by the defendant, and the concession thereof in the bill of particulars furnished by the prosecution, the Court may disregard both such testimony and the bill of particulars and designate such income, which was by check or stock and not in currency, proof of a "probable income-producing source for the cash" on which tax was said to have been evaded.

(e) That a jury may find a defendant guilty of wilful intent to evade tax for failure to report a relatively minor amount allocated to him in a bookkeeping entry and considered as a matter of accounting to constitute income, despite that it was affirmatively shown, without contradiction, that the defendant had neither knowledge nor information about the bookkeeping entry and had never actually (as distinguished from constructively) come into possession of such income.

(f) That over the defendant's objections and protestations that highly prejudicial and inflammatory testimony and documents had no connection with the charges against him and could not be connected, it is proper for the prosecutor, who must have known the same could not be connected, to offer and for the Court to receive such evidence in the presence of the jury, admitting the same "subject to connection"

and at the close of the case many days later, no attempt at connection having been made, to strike out the proof in the absence of the jury and then to charge the jury in language so ambiguous as readily to be understood as a direct instruction to give special consideration to that proof.

(g) That despite the failure of the prosecutor to deny the accusation that in his summation he had brandished before the jury photographs never identified on the record or offered in evidence, and in fact his admission upon the argument of the appeal, not that he had "brandished" the same but that he had held them before the jury in his outstretched hand, it is proper for the Court below to dispose of appellant's contention by saying "we found no evidence" that the prosecutor did so.

(h) That it was proper to receive in evidence against the defendant proof regarding the conduct of his wife which conduct was affirmatively shown not only not to have been authorized by him but in fact altogether unknown to him and concealed from him, especially when the proof of such conduct was calculated to have a highly prejudicial effect upon the jury while at the same time having no probative value whatsoever in support of the indictment; that, inasmuch as the proof of her transactions was by testimony of statements made by her as well as by documents executed by her and thus constituted, indirectly, the production of testimony by the wife against her husband, such testimony is permissible in a Federal Court.

3. Where the Court below holds squarely that a verdict of guilt of tax evasion may be supported by proof of the omission to report specific items of income which at most amounted to only 4% of the income reported, and (a) a

substantial part of even that 4% appeared beyond doubt by the uncontradicted evidence to have been omitted by inadvertence, and (b) by the exclusion of clearly admissible evidence bearing upon another substantial part thereof, the value of property received, the defendant was prevented from proving justification for reporting that item as $22,500 instead of $24,985 and (c) where the discussion of other circumstances said by the Court below to permit the drawing of an inference of guilt is demonstrably a gross distortion of the uncontradicted proof and of the specificity of the prosecution's bill of particulars, can it be said that the defendant had a fair trial? Where, as here, the opinion below recognized that "to split the case apart would be to emasculate it", does it not call for corrective action by this Court that as this case now stands, it approves the concept that the submission of incompetent proof is justified by the very fact that it was necessary to prejudice the jury against the defendant thereby?

4. Does not the ruling in the opinion below holding flatly that it was proper for the trial court to refuse to instruct the jury clearly that the cash deposits and cash expenditures made in the indictment years could not be considered income if the source was currency accumulated by the defendant in prior years, disregard the fair meaning if not the specific principles enunciated by this Court in the *Net Worth* cases (345 U. S. 121, *et seq.*) and is it not directly in conflict with the decisions of the U. S. Court of Appeals for the Fifth Circuit in *Dupree* v. *U. S.*, 218 Fed. 2d 781, 784, *Bostwick* v. *U. S.*, 218 Fed. 2d 790, 794, *Blumberg* v. *U. S.*, 222 Fed. 2d 496, 500 and *Olinger* v. *Commissioner of Internal Revenue*, 234 Fed. 2d 823, and also in direct conflict with the decision of the U. S. Court of Appeals for the Fourth Circuit in *Warring* v. *U. S.*, 222 Fed. 2d 906?

5. Is it not a direct invasion and a denial to the defendant of the protection afforded by the Fifth Amendment of the Constitution against compulsory self-incrimination to

hold, as the Court did below, that it is proper to consider as evidence of his guilt of tax evasion that the defendant refused to give the investigating revenue agents a net worth statement?

6. Where, as here, the prosecution made no effort whatsoever to offer any proof of the defendant's net asset position at the beginning of the prosecution period nor any effort whatsoever to offer proof of any receipt by him of any cash* during the prosecution period is it not a gross transgression of established principles governing the conduct in the Federal courts of a criminal trial to allow proof of his deposit and expenditure of cash in irregular amounts at irregular intervals to be submitted to the jury as evidence of income, upon which the jury was instructed the defendant could be found guilty of tax evasion?

7. Where the prosecution has offered no proof whatsoever that the defendant was not at the start of the indictment years in possession of cash funds substantially in excess of the total of his cash deposits and expenditures during the indictment years, is it not grossly improper in a criminal prosecution (a) to require the defendant to prove that his cash deposits and expenditures did not come from current income, and (b) to justify his conviction of tax evasion on the ground that, although his explanation of the source of the cash deposits and expenditures as a prior accumulation had been completely verified by the investigating Revenue Agent so far as it was material, the Court thought his explanation "fantastic"?

8. Does proof of unreported receipts by checks, of relatively insignificant amounts, deposited in the defendant's bank account, and by bookkeeping entries of amounts, similarly relatively insignificant, which never came into the

---

* Except from checks—such as those for his salary—which he cashed, which he reported as income and as to which no claim of tax evasion was at all suggested.

defendant's hands, and a claim that defendant had undervalued certain shares of stock in reporting the value thereof as income (although the Court refused to allow the defendant to offer proof of market value when the stock was received, to show that he had not so undervalued the same in his income tax return) constitute any proof at all, let alone sufficient proof, "of a likely source" of the cash deposits and cash expenditures here charged as taxable income?

9. In the absence of proof of the source of defendant's cash deposits and cash expenditures (other than from a prior accumulation as claimed by the defendant) does it not amount to an outright violation of essential principles governing the prosecution of criminal cases in Federal Courts to hold, as did the Court below, that it was proper for the trial court to refuse to instruct the jury "that the prosecution must establish the defendant's net asset position at the commencement of the period"?

10. Where, as here, a taxpayer has reported certain income as "other income" and upon inquiry identifies such income by amount and source, and there is no testimony at all of any other income from any other source whatsoever that could be identified with the amount reported, and the prosecution in its bill of particulars makes no claim of any other source of the income specified by the defendant and agreed to by the Revenue Agent, is the Court of Appeals entitled to speculate, without any justification whatsoever in the record, that the income reported may have been from some different, unknown and unproven source, upon which speculation the verdict of the jury could properly be sustained?

11. Where, as here, the prosecution's bill of particulars states specifically, in respect of the items said to be involved in the tax evasion charged, "no disallowance of deductions or exemptions claimed", is it not repugnant to elementary principles governing the conduct of criminal cases in the

Federal Court to approve, as did the Court below, the offering of proof by the prosecutor that defendant had not itemized his deductions, and the argument of the prosecutor based thereon (the mere failure of the defendant to itemize his deductions, and without a scintilla of proof that any such deductions were not proper), that because and only because there had been no itemization the jury could find the defendant guilty of tax evasion, an argument which the Court below said the prosecutor "was plainly entitled" to make?

12. Is it not repugnant to essential principles to hold, as the Court below did, that "the jury was well justified in drawing the inference of wilful evasion" because the defendant did not "procure the usual assistance in preparing his income tax returns"?

13. Is a defendant not entitled, as a matter of right, to have suppressed from use against him in a criminal case in a Federal Court not only the testimony given by him before a congressional committee but also clues and leads derived from such testimony and from documentary evidence supplied by defendant, under threat of committee subpoena, to agents of the committee between his appearances as a witness before the committee itself, about which documentary evidence he was questioned, on his later appearance, before the committee itself, in session?

Constitutional Provision, Statutes and Regulations Involved

The constitutional provision is the following portion of the Fifth Amendment

> "No person • • • shall be compelled in any criminal case to be a witness against himself • • • "

The pertinent text of the statutes and regulations, being lengthy, are set forth in the appendix to this petition, *infra*.

Their citation follows: Internal Revenue Code of 1939, Sec. 145(b); U. S. Code, Title 18, Sec. 3486; Code of Federal Regulations, Title 26, Part 39, Sec. 39.22(a)-3, and Part 81, Sec. 81.18.

Statement of the Case

Petitioner, a lawyer, had been a New York State Senator from 1931 to 1941; although not a tax expert, he was appointed U. S. Collector of Internal Revenue for the First District of New York in 1941, serving as such until 1944 when he was appointed U. S. Commissioner of Internal Revenue, from which office he resigned on June 30, 1947. Prior to and during the period covered by the indictment he had been a member of a law firm in New York City and beginning in July 1947 he had also been a member of another law firm in Washington, D. C. His principal function as a member of these law firms was to attract clients, whose matters were handled by his partners.

He prepared his own income tax returns, without the aid of an accountant, which the opinion below suggests (1181a)* could be considered by the jury as evidence of wilful evasion of taxes, but quite contrary to the critical suggestions of the opinion below (1171a, 1181a) that he did so without records, he derived the information therefor from the bookkeepers of his law firms, his brokers' statements and his cancelled checks and check books (570a, 571a, 635a, 639a-640a). The tax returns for each of the indictment years was filed promptly after the close of the year, about the middle of January each year.

Beyond doubt, these returns show a lack of attention to detail. In four of the years there were minor errors

* References so made are, unless otherwise indicated, to the pages of the Joint Appendix printed for the use of the Court below, to which has been appended the opinion below.

(conceded by the prosecution to be such) in the transposition of figures; in three of the years, 1948, 1949 and 1950, the petitioner did not take as a deduction interest payments made on a mortgage, and other interest payments charged to his brokerage account. He did not report as income a sum ranging from $545 in 1946 to $365 in 1950 for interest received along with amortization payments on a mortgage taken back by him on the sale of his home in 1945. In respect of dividends received, in his original return for 1946 filed January 17, 1947 he had reported receipt of $460; he filed an amended return on March 11, 1947 increasing the figure for dividends to $1,225; according to the prosecution he was still short by $385, although $150 of that was not received until 1947, the check being dated January 3, 1947. According to the prosecution, he failed to report dividends of $1,075 out of $4,825 in 1947; $1,230 out of $9,930 in 1948; $405 out of $10,895 in 1949; and $410 out of $11,650 in 1950.

He reported gross income for those years of $68,588.57 in 1946; $90,700.83 in 1947; $103,017.05 in 1948; $115,148.08 in 1949; and $143,889 in 1950.

The prosecution charged evasion of tax on the sum of $5,525.48 of the income from his New York law firm in 1947, because in the partnership agreement of July 1947 it was recited that petitioner and one of his partners, Bongard, were contributing $28,000 to the new firm as its capital, of which each was the owner of one-half, whereas, the Revenue Agent testified, the accumulated undrawn earnings from prior years properly creditable to petitioner at that time was $8,474.52 and therefore the difference between that figure and $14,000 then became income to him because of the agreement, and should have been reported as such. The firm's bookkeeper, called by the prosecution, testified that petitioner had no knowledge of the bookkeeping and accounting computations, that she gave him the figures to report as his income from the law firm for each

of the years, and that the figures thus furnished by her appear on petitioner's tax returns for those years and are the same as those appearing on the partnership information returns prepared by her or one of the other partners; neither she nor Bongard thought that that difference as to both partners was income; petitioner never drew any part of the $14,000.

In 1948 petitioner collected $1,800 which he had won on a wager made by him at odds of nine to one on Mr. Truman in the Presidential election. He did not report this because he had lost as much in wagers as he had won (626a). The trial court charged the jury that it was undisputed that the defendant had received but had not reported this $1,800 and "gambling gains must be reported. Gambling losses are not deductible unless so claimed and supported." The Court refused to supplement such instruction to avoid misleading the jury and making them feel that they must convict on that item, although obviously, if the defendant had gambling losses offsetting the gambling gain, no tax was due.

On January 5, 1948 petitioner received 2,630 shares of Brown & Bigelow stock as a fee for services rendered. The prosecution claimed that he had understated this fee by $2,485 in his tax return (1031a, 758a, 761a) having reported $22,500 whereas the prosecution claimed it should have been $24,985. The Court below held (1190a) that this was "relevant to the periodic currency deposits and expeditures phase of the case, and especially so on the issue of motive, intent and wilfulness."

The petitioner offered to prove through a broker and by the broker's records that on January 5, 1948 the stock was selling at 8⅝; he also offered to prove through the National Quotation Bureau, the mean between bid and asked prices on that date. The proffered evidence would have established that petitioner had properly valued the stock as of the date of its receipt by him, and had not un-

derstated the payment as received. The pertinent tax regulations, 26 C. F. R. Part 39, Sec. 39.22(a)-3 and Part 81, Sec. 81.10 (printed in the Appendix *infra*), show that the market value on the date of receipt is the amount to be included as income. Yet the Trial Court excluded the evidence offered, and the Court below has held that this was not error and that it was proper for the jury to find the defendant guilty of tax evasion because of the undervaluation,—even though there was in fact no undervaluation.

The theory of the Court below was that because the defendant had agreed to accept the stock in payment for his services and had rendered a bill in December 1947 for $24,985, which he had been told was the value of the stock when he agreed to accept it, he was bound by the higher figure, and to admit the evidence of actual value on the date received "could have served no other purpose than to confuse the jury."

The Court below also held that the argument in the prosecutor's summation that this fee was not disclosed to petitioner's law partners was amply justified (1190a), that "the jury may well have found that appellant concealed the fee from his partners" (1178a) and that this fee "had a bearing on the sources from which he derived the large amounts of currency deposited and expended. • • • How much more likely was he to withhold information of fees paid in currency • • • It would be far from strange if services of this character were paid for in cash" (1181a).

All of this despite the testimony by petitioner's partner that petitioner had told him of the Brown & Bigelow matter and that the firm would not share in the fee, and despite that under the partnership agreements in both the New York and Washington firms the petitioner was not obligated to share all of his business with either firm.

Ward, the president of Brown & Bigelow, intended to make a public offering through Otis & Co. of his personally

owned Brown & Bigelow stock. Fearing difficulties, although none actually occurred, because of antagonism between the S.E.C. and Otis & Co., Ward had retained appellant to counteract any difficulty which might arise. Ward also was seeking a ruling from the Bureau of Internal Revenue whether the proceeds of the sale would be taxed as capital gain or as ordinary income, and was anxious to secure such a ruling before a special stockholders' meeting noticed for December 6, 1947. Ward's attorneys had been unable to get a hearing at the Bureau of Internal Revenue, and Ward was concerned lest the underwriters withdraw because of delay. Petitioner was requested to assist in getting Ward's counsel such a hearing, and he succeeded in doing so in November 1947. Late in December 1947 Ward, instead of asking petitioner to fix his fee, told him that he intended to pay $25,000 to him for his services, and as a retainer for advice he might thereafter require. Ward stated that he wanted petitioner to accept Brown & Bigelow stock in payment and requested a bill for $24,985, the offering price of $9.50 a share for 2,630 shares. On December 28 petitioner sent his bill in that amount. The prosecutor's claim, sustained by the Trial Court and approved by the Court below, was that petitioner was bound by the amount of his bill, regardless of the actual value of the stock when he received it!

But this is not all on the subject of Brown & Bigelow. As stated, the only issue was whether petitioner had wilfully attempted to evade tax by undervaluing the stock. Nevertheless, the prosecution was permitted to introduce irrelevant and highly prejudicial evidence having no bearing on that issue. This evidence was that Ward had previously, in 1946, contemplated a similar public offering of stock and had sought a "closing agreement" in respect of the tax. Ward's counsel had had a conference concerning this with a Deputy Commissioner and a number of attorneys from the Legal Division of the Bureau of Internal

Revenue, and had obtained such a closing agreement signed (as all such are required by law to be) by the petitioner, as Commissioner, and by the Under Secretary and Acting Secretary of the Treasury. The agreement was offered in evidence and the fact that it had been signed by the petitioner was emphasized and reiterated to the jury.

Although the prosecution's own witnesses testified that the fee paid petitioner in 1948 was for services rendered after he was retained late in 1947, when he was no longer Commissioner of Internal Revenue, the jury was asked to infer that it was connected with the abandoned 1946 ruling. The prosecutor's summation on the subject covers eleven pages of the record. The testimony concerning this transaction covers eighty pages of the record.

Yet the only legitimate issue in the case was whether petitioner had undervalued the stock received by him by $2,485, and as to that he was shut off by the Court from offering any testimony to prove that he had not so undervalued it.

The prosecution claimed that petitioner had failed to report and had wilfully evaded tax on a payment of $500 made to him by Anheuser-Busch, Inc. Petitioner had received $500 in October 1950, $500 in November of 1950 and $500 in January 1951, by a check dated December 29, 1950 and mailed from St. Louis, Missouri on that date. On his original tax return filed January 12, 1951, petitioner had reported $1,000 of that amount. Subsequently he received from Anheuser-Busch a duplicate of their information return setting forth payment to him of $1,500 in 1950. Petitioner filed an amended return for 1950 on June 27, 1951, in which he reported the additional $500.

The Court below implies (1179a) doubt that the first two payments were included in petitioner's original 1950 return, to which the third was added in the amended return, and says that petitioner's claim that these payments were

included "is obscure to us" (1191a). But the Revenue Agent testified that it was (771a, 772a-773a), and the bill of particulars omits any claim that the income was unreported. The claim of tax evasion is predicated on the fact that the amended return was filed after March 15, 1951.

Petitioner's motion to strike the evidence concerning the transaction on the ground that the third $500 check was actually 1951 income since it was neither received by nor available to petitioner until 1951, petitioner being a cash basis taxpayer, regardless of petitioner's erroneous inclusion of the amount in his amended return because of the information return received from Anheuser-Busch, was denied.

Petitioner had testified that he had been hired by Anheuser-Busch not for any legal services but to promote the sale of their beer in New York, that Mr. Busch had said to him "I don't want any legal services, * * *" (590a). The prosecution witnesses said that petitioner had been retained for "advice of counsel" although they acknowledged that they had never called on petitioner for legal services of any kind whatsoever. It was also testified by them that they had told petitioner that they preferred to retain and pay him personally, rather than his law firm. But the prosecutor was allowed to put before the jury that the so-called retainer had been given to petitioner at a time when Anheuser-Busch was completing the building of a brewery in New Jersey for which permits would have to be secured from the Alcohol Tax Unit (part of the Bureau of Internal Revenue) although that was never discussed at all with petitioner, and that the "retainer" was terminated as soon as the brewery was completed. The prosecutor was allowed to argue in summation and the Court below adopts the same idea in its opinion, that these payments by Anheuser-Busch to petitioner were to obtain the benefit of his influence and that they allowed the

jury to draw an inference that such was a likely source of income reflected by the cash deposits and expenditures because petitioner had not shared the checks with his law firms!

Peculiarly, the Court below devotes more than half a page (1180a), some twenty-two lines, to the discussion of an item not mentioned in the appellant's brief below, barely mentioned in the appellee's brief and passingly referred to, as immaterial, in a foot-note in appellant's reply brief. But the Court below seemingly attributed much importance to the matter as evidence of the petitioner's wilful intent to evade tax and of a likely source of income for the currency deposits because, the Court below seemed to think, it showed that the petitioner concealed his receipt of law fees from his law partners. The matter has to do with a forwarding fee paid by the law firm of Glass & Lynch. Petitioner will not waste this Court's time with any detailed refutation of the unwarranted and baseless discussion by the Court below, beyond noting, because it bears directly on the approach taken by the Court below, that (1) there was no evidence at all that petitioner had failed to report and pay the tax upon the income, (2) the record shows that when the matter arose he was not a partner in the law firm and under no obligation in respect of sharing the fee, (3) appellant's brief made no such explanation as that which the Court below describes as "futile", and of course no such explanation was made by the appellant for the very good reason that none was ever called for, (4) there was no evidence that the Government lost any income taxes, and, finally, (5) the payments discussed were made in 1944 and 1945, prior to the indictment years. The record shows that the payments were made to petitioner by checks which were deposited by him in his bank account. Perhaps the seizing upon and the stressing of this item by the Court below illuminates the paucity of support for the indefensible supposition that there may be winnowed out of the record some

basis for an inference of a source, other than a prior accumulation, to which to attribute petitioner's cash deposits and expenditures during the indictment years.

The Court below puts in the category of fees concealed by petitioner "not only from the tax authorities but also from his law partners" having "a special relevancy", the matter of the payment by Unexcelled Chemical Co. Here, strangely, the Court below appears to attach significance to a claim that, despite the uncontradicted testimony to the contrary, appellant concealed receipt of a fee from his law partners because, forsooth, "no record of the receipt of stock", part of the fee, "was made in the firm books". The testimony at the trial adduced from one of petitioner's law partners was (819a-825a) that the stock in question had been received by the firm in January 1950, to be held on account of fee until the legal services for which it was intended as payment were rendered. The legal proceedings reached the point of decision in mid 1951. Thereafter the stock was sold, and the proceeds were deposited in the firm's bank account and entered on the books of the firm as a fee. The income upon which tax was said to be evaded in 1950 was the value of the stock when received, $2,997.50; the income recorded on the books of the law firm when the stock was sold, and upon which the tax was paid, was $7,420.93. It is too difficult for petitioner to understand how, on these facts, it can possibly be imagined that the incident can give rise to an inference that he "concealed" fees from his law partners, that he wilfully evaded taxes, or that he had a likely source of unreported currency income.

Other items said to support an inference of wilful tax evasion are the omission to report a capital gain of $544.80 in 1950 on the sale of some stock in petitioner's brokerage account (the proceeds of which were not drawn upon by petitioner); and the omission to report in the original tax return filed for 1949, although included in his amended return for that year, the receipt of $2,250 as remuneration

from American Lithofold Corp., which had employed petitioner to obtain business, which petitioner proceeded to solicit.

The Court below in its opinion mistakenly states the amount of the American Lithofold payment to petitioner in 1950 as $1,200, whereas in fact it was $1,250. Perhaps because of this error the Court below thought that petitioner's claim that he had reported the income was obscure. It was not obscure to the prosecution or to the investigating Revenue Agent, who acknowledged that petitioner had reported that income.

It was undisputed that petitioner had properly reported in his 1950 return, filed January 12, 1951, his 1950 income from American Lithofold Co. The contention was not that he had failed to report the $2,250 of income in 1949 from this source, but that he could be found guilty of tax evasion because he had not included the amount in his original 1949 tax return, filed in January 1950, but had waited until he filed an amended return for that year in June 1951. This omission was thought below to justify an inference of a likely source of unreported currency income, even though the payments received by petitioner were by check deposited in his bank account. The Court below also thought that the trial court was justified in refusing, at defendant's request, after the prosecutor had argued in summation that amended tax returns were unacceptable (971a-972a), and a taxpayer had no right to file them after the March 15th following the tax year, to charge the jury that an amended return does not have to be filed before March 15th, but can be filed at any time.

Finally, there is the acceptance by the Court below of the prosecutor's argument that the jury could properly find petitioner guilty of evasion of tax on a payment of $1,500 by a Dr. Jones. Petitioner and Dr. Jones discussed the fee to be paid by Dr. Jones and the petitioner accepted $6,000, endorsing over to certain charities an additional

$1,500 in checks of Dr. Jones. The $6,000 was turned over to petitioner's law firm and duly recorded and reported as income; the $1,500 which went to charity was not. Although the bill of particulars had specified that the prosecution made no claim in respect of the deductions for charitable contributions taken by the petitioner in his tax return for the year in question, the prosecutor was held to be entitled to argue to the jury that the petitioner had evaded taxes because he had failed to report this $1,500 as income even though it had been a charitable contribution, and that the jury could conclude, without evidence, that the $1,500 had been included in the charitable contributions deducted by the petitioner in his tax return which did not include the income. The Court below held (1179a-1180a) "the jury would have been justified on the evidence" (there was none at all) "in concluding not only that the firm lost its share of the $1,500 portion of the fee, but that there was at least the possibility that appellant took the charitable deduction twice".

The Court below thought that (1181a) "the way appellant handled the fees" (all of which were by checks deposited in his bank account or shares of stock which he held) "had a bearing on the sources from which he derived the large amounts of currency deposited and expended." The Court below thought that "if he withheld from his firm and from the Government information of fees which he was paid by check, how much more likely was he to withhold information of fees paid in currency." The Court below made no mention of the absence of any evidence whatsoever of any "fees paid in currency" nor does it cite any authority for the proposition that in a criminal case in the Federal Court a conviction may properly be predicated upon an inference based on a surmise pyramided upon a suspicion arising out of a guess. In this connection it may be pertinent to note that when the Revenue Agent who was the Government's principal witness was asked whether some of the currency spent in 1946 came from the cashing by petitioner

of his salary checks (on which the tax had been paid) which the prosecution had conceded the petitioner had converted into cash to the extent of at least $19,000, the Agent replied "Your guess is as good as mine."

The Court below held (1174a) that the record showed "evidence amply sufficient to warrant a finding by the jury that there never was any such fund of $170,000 or anything approximating such a sum in appellant's possession * * *" in dismissing as "belated and fantastic" petitioner's explanation of the source of the cash disbursements and expenditures.

In the first place, petitioner's explanation could scarcely be described properly as "belated". The Court below ignored the uncontradictable fact that the very first time that the petitioner was ever asked about the source of any cash expenditures was by the Congressional investigating committee on March 18, 1952, the official stenographic transcript of which shows his prompt response that his cash expenditures came from his prior accumulation. The Revenue Agent conceded that he never asked petitioner about the source of his cash deposits and expenditures. He did ask petitioner for a net worth statement which, on the advice of his counsel, petitioner refused to supply.

The petitioner gave his detailed explanation when he was interrogated by the U. S. Attorney and before the Grand Jury. Reference to the actual record demonstrates that there were no inconsistencies, but only the normal approximations and uncertainty as to exact detail of one recalling events twenty years in the past.

Petitioner gave his recollection of sources of funds totalling $171,500. The Revenue Agent did not check up on $23,500 of this amount and as to the balance he said that his verification showed about $16,000 less than the amounts stated by petitioner,—but $10,000 of this $16,000 was an item about which the Agent said only that he could find no

record. Petitioner said that out of that accumulation he had spent $20,000 in the purchase of his home; the Revenue Agent claimed that the expenditure was $23,000 rather than $20,000. The total of the cash deposits and the expenditures involved was approximately $98,000. Obviously even at the "corrected" amounts according to the Revenue Agent, there was substantially more in the accumulation than the total of the cash deposits and expenditures. Hence, "fantastic" would seem to be a fantastically inappropriate label for the Court below to apply.

No attempt whatsoever, in any respect, was made by the prosecution to offer any evidence of the petitioner's net asset position at the commencement of the indictment period.

In stating in its opinion that "for the years 1945 through 1950 the Revenue Agents unearthed $160,000 of deposits and expenditures in excess of appellant's reported net income" the Court below, doubtless unintentionally, seems to give the impression, especially from coupling the statements in the same sentence with its reference to the $98,000 total of cash deposits and expenditures, that the $160,000 figure represents unreported taxable income. That is simply not true. No claim was made by the prosecution that any of these bank deposits, except to the extent that they included the specific items mentioned above such as interest, dividends, Anheuser-Busch and American Lithofold payments, constituted unreported income beyond the amount of cash deposited. And as to the cash expenditures, the Revenue Agent was unable to say whether or not they might have come from checks drawn on that bank account which were cashed, any more than the Revenue Agent could do anything other than "guess" whether some of the cash expenditures were from the funds obtained by petitioner's cashing of his salary checks.

The Court below refers to the absence of petitioner's personal records as partial justification for an inference of wilful evasion; so the trial court charged the jury. The

Court below does not mention, however, that until after the Agent had asked for them, petitioner did not know that his wife, without informing him, had destroyed his records, which he had kept in his home and which he thought were still there. Perhaps one might entertain some doubt of the credibility of the petitioner and his wife on that score, but there was ample and unquestionable corroboration of petitioner's wife's habitual course of conduct of keeping from her husband any inkling of her activities of which she feared he might disapprove.

Thus, it was shown (and it was strenuously argued by the prosecution that without other proof the jury could refuse to credit petitioner's explanation of the accumulation of funds simply because it was shown) that his wife had frequently overdrawn her bank account and had often borrowed money.

In every such instance there was uncontradicted testimony from the Government's witnesses that Mrs. Nunan had impressed upon them that the transaction must be kept secret from her husband, or that the transactions were in fact unknown to him (443a, 487a, 491a, 518a, 553a, 863a). The prosecution offered no evidence that petitioner himself had ever been in need of funds. The ledger sheets of his bank account, in evidence from 1937 on, showed for the years prior to the indictment period deposits of over $40,000 a year.

That her borrowings and extravagances gave no support for an inference of a lack of available funds is apparent on the record. For example, she was shown to have borrowed $4,000 in 1928. Yet at that time she was concededly (697a) the owner of stock worth at the very least more than $32,000, and during the preceding three years she had unquestionably received payments of more than $87,000 from her uncle's estate. The prosecution showed that in January 1950 two of Mrs. Nunan's checks, in the amount of $3,161.75 and $1,500, were not honored by her bank because

her funds on deposit were insufficient,—one of these checks was twice returned for this reason. But petitioner's bank balance at that time was well over $48,000, and he had reported income for the preceding year of $115,148. Logic will not allow, under such circumstances, an inference to be drawn that her lack of financial stability could be taken as an indication that petitioner lacked ample funds. But it is equally obvious that a jury would inevitably be gravely prejudiced against petitioner by the evidence of Mrs. Nunan's spendthrift behavior.

Altogether irrelevant but highly damaging (because of its necessarily prejudicial effect upon the jury) testimony was offered by the prosecution and admitted in evidence, over the objections of petitioner, on the prosecutor's assurance that it would be "connected." It was shown that petitioner had, on March 27, 1946, purchased shares of stock of the Gaylord Container Co. The prosecutor adduced proof that on March 15, 1946 that corporation had requested a ruling as to the effect taxwise of a proposed three-for-one split of its stock. The corporation's attorney testified that he "had a feeling" that he had telephoned petitioner before the ruling was issued, to discuss it, and that he passed along a rumor then current that the corporation might strike oil on property that it owned in Louisiana.

There was put in evidence a copy of the ruling which was issued to the Gaylord Container Co., and the jury was informed that that ruling had been signed by petitioner, who was then Commissioner of Internal Revenue.

The proof was never connected, nor was any attempt made to connect it. At the time that the testimony was admitted, petitioner's counsel, in objecting, had asked the Court to require the prosecutor to explain to the Court how he proposed to "connect" it before it was received. The

Court refused to require any statement from the prosecutor. The prosecutor assured the Court that the testimony would not be prejudicial and would be related to the charge of tax evasion.

At the close of the Government's case, no attempt having been made to connect that testimony to the charges, appellant moved to strike out the testimony and the exhibits (the request for the ruling and the ruling itself). The Trial Court struck out only the exhibits, and moreover the jury was not informed that the exhibits had been stricken.

In this posture of the matter this was the language of the Court's charge:

> "The evidence, as distinguished from the law, is within your province to consider disregarding of course all evidence which the Court ordered stricken from the record, including exhibits 122 and 123 pertaining to the closing agreement with the Gaylord Container Company and the testimony of the witness Buford concerning those exhibits."

Inasmuch as the jury had not been informed that those exhibits had been stricken, and as the testimony of the witness Buford had not been stricken, surely it is obvious that the jury may well have understood that the instruction as given called upon them to give particular consideration to those exhibits as well as to that testimony.

The Court below disposed of petitioner's assignment of error by saying "they were not read or shown to the jury," thus disregarding the fact that the contents were described by the witness and the prosecutor had stated before the jury that he had "the actual letter signed by Mr. Nunan." The Court below said that the testimony of the witness had been stricken; that is not so. The Court below said that the prosecutor had "made no comment about these exhibits"; that is just not so. The Court below said "the instructions of the trial judge to the jury to disregard the

exhibits and the testimony amply protected appellant." It is at least open to question that the jury could have understood what was meant by the instructions as given, and it may certainly be doubted that such instructions "protected" the petitioner, amply or in any degree.

In many respects (*vide* 1096a-1102a) the prosecutor's argument to the jury appealed to prejudice, stated his personal knowledge as to facts either not in evidence or contrary to evidence, and invited speculation by the jury on matters without support in the evidence or contrary to the evidence. One instance of impropriety was the conduct of the prosecutor in respect of the appearance and size of a closet in petitioner's home. The prosecutor held before the jury a batch of photographs which had never been offered, identified or even mentioned during the trial, and said that he had not offered his photographs thereof in evidence because petitioner's counsel would have objected to them.

The Court below held that "This was legitimate argument". The Court below also said that it could find no evidence that the prosecutor "brandished" the photographs before the jury, although the prosecutor had refrained from denying that he had done so when petitioner's counsel argued the question before the trial court, and although upon the argument of the appeal before the Court below the prosecutor had specifically admitted that he had held the photographs in his outstretched hand before the jury when he made the argument reported in the record (990a).

Petitioner had moved to suppress evidence based upon his testimony before a Congressional investigating committee, or evidence obtained as a result of clues and leads derived therefrom. The Court below held, on the authority

of *U. S.* v. *Brennan*, 214 F. 2d 268, that the prohibition of the statute (18 U. S. C., § 3486) in its then form before it was amended on August 20, 1954, applied only to direct testimony before the committee itself and had no application to statements made to agents of the committee. The Court below said also that the Revenue Agents were not connected with the committee but after their investigation was under way were told to cooperate with the committee by answering any questions put to them by the committee. Accordingly, the Court below held that the motion to suppress had properly been denied when it was argued before trial, when it was renewed at the commencement of the trial and when the issue was presented by objections to the introduction of evidence.

The Court below made no reference whatever to the time sequence: the Agents, Carnes and Saldana, had first called upon petitioner on October 17, 1951; on April 23, 1952 both of them, sitting side by side and assisting each other in jointly testifying at once before the committee, participated in the following testimony *:

> "Mr. DeWind: Mr. Carnes, both you and Mr. Saldana have been assigned to conduct an investigation of Joseph D. Nunan, Jr., in conjunction with the work of this committee, have you not?
>
> Mr. Carnes: That is correct.
>
> Mr. DeWind: When were you assigned to that investigation?
>
> Mr. Carnes: I was assigned to Mr. Nunan's investigation October 15, 1951.
>
> Mr. DeWind: And both you and Mr. Saldana have been working on that investigation continuously since that time?
>
> Mr. Carnes: That is correct.
>
> Mr. DeWind: Could you please describe, Mr. Carnes, the general nature of the investigation that you have made of Mr. Nunan?

* Quoted from the official printed transcript of the public hearings of the King Committee, Part 4, pp. 3533-4.

Mr. Carnes: The general nature was to look into Mr. Nunan's activities while he was Commissioner of Internal Revenue, and to investigate his financial transactions for the period 1945 through 1950.

Mr. Keogh: May I interrupt you there, Mr. Carnes? Was the type of investigation which you conducted the usual type that is conducted where there is some evidence of or suspicion of fraud?

Mr. Carnes: No. As I understand, I was told to cooperate with the King committee in their investigations, and the investigation would not be the normal type. In other words, usually there is some reason to start an investigation."

Petitioner testified before the committee on September 12, 1951 and on March 18, 1952. On September 12, 1951 his testimony concerned the items of income in 1949 and 1950 from American Lithofold Corp. and Anheuser-Busch, Inc., which were put in evidence at the trial. Several times in the interval between petitioner's two appearances before the committee, the Agents had pointed out to petitioner and his counsel that they could and would procure the issuance of a committee subpoena to compel the production of any documents, if necessary; they frequently characterized the information being furnished to them as being in conjunction with and preliminary to petitioner's subsequent appearance before the committee. When petitioner did testify subsequently before the committee on March 18, 1952, he was questioned extensively concerning the contents of the documents he had thus made available to the committee's agents, and the documents so obtained, and evidence derived therefrom, constituted a substantial part of the Government's case at the trial.

Agent Carnes was not called as a witness at the trial.

In addition to the testimony quoted above he, with Agent Saldana, testified in detail to the amounts of cash deposited and expended by petitioner during the five-year period, such amounts being the same as specified in the

prosecution's bill of particulars. The stenographic minutes of this hearing of the committee sets forth this question and answer (p. 6537 of the official printed transcript):

> "Mr. DeWind: Do you actually have any evidence that the $97,000 expended or deposited during the five years constituted unreported income to Mr. Nunan upon which any taxes were due?"
>
> "Mr. Carnes: We do not."

The indictment, alleging five violations of Sec. 145(b) of the Internal Revenue Code of 1939 (26 U. S. C. Sec. 145(b)), one in each year from 1947 through 1951 pertaining respectively to taxes upon income in the calendar years 1946 through 1950, was returned by the Grand Jury in the U. S. District Court for the Eastern District of New York on December 2, 1952. The case was moved for trial on June 8, 1954 before Bruchhausen, J. The appeal below was argued January 17, 1956, and decided September 6, 1956.

Argument

The reasons relied on by petitioner for the allowance of the writ are these:

1. The decision below is in conflict with the decisions of other Courts of Appeals on the same matter;

2. The Court below has rendered a decision in conflict with applicable decisions of this Court;

3. The Court below has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the Trial Court as to call for an exercise of this Court's power of supervision;

4. The Court below has decided an important question of Federal law which has not been, but should be, settled by this Court.

I.

In holding that in what is termed a "bank deposits and expenditures" case the prosecution need not establish the net asset position of the defendant at the start of the indictment years, the decision below is in direct conflict with decisions of the Court of Appeals in the Fifth Circuit on the same subject and a similar decision of the Court of Appeals in the Fourth Circuit. It appears to be in conflict with an applicable decision of this Court, at least as that decision has been interpreted by the Court of Appeals for the Fourth Circuit.

In *Warring* v. *United States,* 222 F. 2nd 906, the Court of Appeals in the Fourth Circuit predicated its affirmance of the conviction on its determination that the proof of the defendant's net asset position at the start of the period in question had been sufficiently corroborated. In the course of its opinion and in support of its ruling the Court (p. 911) quoted from the opinion of this Court in *Smith* v. *United States,* 348 U. S. 147, 159, with emphasis on the italicized words in the following excerpt.

> "These substantial expenditures, savings and investments might not, of themselves, *suffice to support a conviction of tax evasion* without evidence of a starting point indicating a lack of funds from which these payments might have come."

See also *United States* v. *Riganto,* 121 F. Supp. 158, 162, where Chief Judge Hutcheson said:

> "• • • you will readily understand that unless, at the beginning of the period under investigation, the correct amount is established, the theory as to income built up by the net assets or bank deposits method falls because it has no proper base upon which it is founded. It is evident from the testimony in this case there was not a proper starting point insofar as the bank deposits and expenditures method is concerned. If, in such circumstances, the case should be submitted to the jury and they should,

by possible chance, arrive at a verdict of guilty, they could do so only upon conjecture, theory or speculation. When such circumstances exist, it is the duty of the trial court, when an issue of this kind is made up by motion, to sustain the motion."

The Court of Appeals in the Fifth Circuit has discussed the question in at least three cases:

Dupree v. *United States,* 218 F. 2nd 781, 784, where it was held that in a prosecution based on the theory that the defendant's expenditures exceeded his available funds, the government was required to establish the funds available to the defendant at the start. "In this respect it is similar to a so-called 'net worth' case. If there is no established figure showing the source from which expenditures during the year can be made, or the complete lack of such a source, then there is no relevance to proof of expenditures during the year, no matter how large they may be."

Bostwick v. *United States,* 218 F. 2nd 790, 794, where in determining the sufficiency of the evidence, the Court describes the bank deposits method used as involving a determination of the amount of the cash on hand at the beginning of the tax period and allowing for the same in computing the subsequent cash deposits and expenditures.

Olinger v. *Commissioner of Internal Revenue,* 234 F. 2nd 823, a civil case, holds that tax evasion cannot be proved by evidence of bank deposits and expenditures of currency unless, as a condition precedent, convincing evidence is offered that the defendant was not possessed of a source of such currency at the beginning of the prosecution period.

In holding that the conviction in the case at bar may be upheld on the assumption that the jury may have found willful intent to evade taxes in the failure of the defendant

to report some or all of the relatively insignificant items of income mentioned in the foregoing Statement of the Case and that even if it be assumed that the jury had not accepted as proof of guilt the evidence of the cash bank deposits and expenditures, the admission of the evidence of such cash deposits and expenditures was not prejudicial error, the decision of the Court below is in direct conflict with the decision of the Court of Appeals in the Fifth Circuit in *Blumberg* v. *United States,* 222 F. 2nd 496, wherein in just such a case the Court held (p. 500) that the admission of the evidence of such cash expenditures was grossly prejudicial. "With that evidence before the jury, and no corrective charge given in respect of it, there was no possibility of defendant's securing an unprejudiced consideration by the jury of his claim that the omissions were due to oversight rather than intention." The conviction was reversed.

II.

If the proper interpretation of the language of this Court in *Smith* v. *United States,* 348 U. S. 147, 159, quoted above, is that the prosecution must, to support a conviction upon evidence of substantial expenditures and deposits, prove that the defendant did not have funds at the starting point from which these expenditures and deposits may have come, then obviously the decision below is in direct conflict.

If that interpretation of this Court's decision is not in accord with the meaning, then, petitioner submits, this case involves a very important question of Federal law, which has not been, but should be, settled by this Court.

The issue is squarely presented because the Court below has held (1183a) that it is unnecessary to support a charge of tax evasion based upon the expenditure and the deposit in banks of currency to prove the defendant's net worth at the beginning of the prosecution period. The Court below held that the requirements of the Net Worth cases (348 U. S. 121 *et seq.*) do not apply.

The question is presented whether proof that the defendant failed to report income amounting to a very minor fraction of his reported income, even though that relatively small amount of unreported income came to the defendant in the form of checks which he deposited in his bank account or in the form of securities which he held and did not market, is sufficient to establish that the defendant had a likely income-producing source from which he obtained the cash which he expended and which he deposited in his bank account; and that this is so even in the absence of so much as a scintilla of evidence to show that the defendant ever received any cash during the indictment period except by cashing his salary checks which he reported as income and upon which the tax was paid.

The Court below has held that the fact that the defendant had a "lucrative law practice" can be considered a likely source of cash income, even though there was not a scintilla of evidence that he had ever received any income at all in the form of unreported cash from his law practice.

The question is certainly of importance and certainly has never been decided by this Court that such proof of non-cash income may be taken by a jury as establishing a likely source of cash income, without further proof that any cash was ever received, and that in such a case the defendant's net asset position at the start of the indictment period need not be shown.

III.

The recital above of the questions presented, numbers 1, 2, 3, 11 and 12, shown to be involved by the foregoing Statement of the Case, needs no amplification by further argument to show that the Writ should be allowed because the Court below has so far departed from the accepted and usual course of judicial proceedings, and has so far sustained such a departure by the trial court, as to call for an exercise of this Court's power of supervision.

Just as in *Demetree* v. *United States*, 207 F. 2nd 892, 893, 894, this case was

> "• • • tried on a theory which, keeping to the ear the promise that a defendant is presumed innocent until his guilt is established beyond a reasonable doubt, breaks it to the hope by allowing a series of theoretical estimates and computations as to defendant's income to take the place of proof of it.
>
> "Sometimes conclusions from those computations and estimates are allowed to invade the province of the jury and furnish the basis for a conviction not upon evidence of facts but upon speculation and theorizing by the government's witnesses as to what the facts really are.
>
> "Sometimes, without adhering to the essentials of the method, that the net worth at the beginning as well as the end of the period be shown, the proof comes in and the case is submitted *with a complete gap in the proof as to the beginning of the period.*
>
> "• • • Further and more prejudicial to a defendant, there has grown up a kind of ancillary theory that the government, by introducing proof of deposits, expenditures, etc., having put up what it calls a *prima facie* case, the defendant finds himself jockeyed out of the position the law affords him, of insisting that the government establish his guilt by legal and credible evidence beyond a reasonable doubt. This is accomplished by requiring him to prove himself innocent by assuming the burden of overcoming the prejudicial effect of the mass of exhibits, estimates, conjectures, and conclusions which the government has been allowed to get into the record, upon the apparent theory that it is up to the defendant to explain all of it away as part of his burden to prove his innocence." (Italics supplied.)

This Court has said in *Holland* v. *United States*, 348 U. S. 121, 129, in a context clearly applicable to the case at bar:

> "• • • Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the

> prosecution to utilize, is equally hard for the defendant to refute. Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused."

It is certain that, whatever else may be said about it, the charge in the case at bar was less than clear. Petitioner's counsel had asked the trial court to charge

> "The Government must establish beyond a reasonable doubt that the items claimed to be income to the defendant were income in the years in question. On this you may not speculate nor may the Government ask you to speculate or guess. If you believe that the cash deposits and cash expenditures during the years 1946 to 1950 came from an accumulation of cash, accumulated prior to 1946, as stated in substance by the defendant, then such cash is not income in the years in question and the defendant was not required to report such cash in the years in question nor was he liable for any income tax on such cash.'

No objection to that request was stated by the prosecutor, although he did object to other requests, in part, yet the trial court refused so to charge. The court did charge:

> "The Government need not prove the sources of income nor need it refute all possible sources other than income."

The Court below acknowledged that the trial judge did not adopt the language proffered nor did he cover the same matters in sequence, but it thought that his instructions adequately and clearly covered the substance.

The Court below thought that the jury must have absorbed sufficient instructions on the subject because "the pros and cons were referred to again and again in the testimony of various witnesses and in the arguments of counsel". A reading of the charge (997a-1008a) will in

and of itself demonstrate beyond need of further discussion that the Court below has so far sanctioned a departure by the trial court from what this Court has enunciated as the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

IV.

The Court below has decided several important questions of Federal law which have not been, but should be, settled by this Court. These are:

> (1) That a jury may consider as evidence of guilt of tax evasion that a defendant has refused to provide the Revenue Agents with a net worth statement;
>
> (2) that by oral testimony as well as by documents executed by her, the transactions of a defendant's wife may be offered in evidence against him, without any effort whatever to show that the husband even knew about them, let alone that the wife was acting as the agent of the husband; (3) that the statutory protection of a witness before a Congressional Committee is limited to only the direct use in a criminal case of his exact testimony before the Committee itself in a regular session.

(1)

It is an important question of Federal law, which should be settled by this Court, whether the Court below is correct in its ruling in the case at bar that it is proper to adduce as evidence against a defendant in a criminal case that he has refused to provide the investigating revenue agents with a statement of his net worth, and that the jury may consider such refusal as evidence justifying an inference that the defendant was guilty of tax evasion.

If that ruling be correct, then surely the approval of the doctrine by this Court ought to be announced for the guidance of the Bar, because lawyers generally believe that such a practice would be an invasion of the right of the defendant in a criminal case not to be a witness against himself. As illustrative of the position of the Bar on this subject, reference may be made to the publication of the AMERICAN LAW INSTITUTE, THE PRACTICAL LAWYER, The Magazine for the General Practitioner, where in an article published in the May 1956 issue, Volume 2, No. 5, entitled "The Handling of Tax Fraud Cases," at pp. 40-41, the admonition is emphatically given that, in fraud cases, counsel should never allow his client to give the agents a net worth statement. If by such advice counsel are compromising the position of their clients because the refusal will result in providing the prosecution with cogent evidence of guilt, it would seem that this Court should say so.

On the other hand, if counsel are correct in believing that the Court below has fallen into egregious error in its enunciation of that doctrine, this case calls for action by this Court to vindicate the protection presumed to be accorded by the Fifth Amendment against compulsory self-incrimination; for if a net worth statement would furnish the prosecution with evidence tending to incriminate the defendant, he is damned if he does and he is damned if he does not.

The same might, in truth, be said about the theory implicit in the opinion below that when it is shown that the defendant has made substantial bank deposits and expenditures in cash at irregular intervals, the defendant is required to provide a "satisfactory" explanation under pain of being convicted of tax evasion if it may be suspected that his explanation is not in all respects true.

(2)

The prosecution offered evidence in this case concerning dubious behavior of the petitioner's wife in that she frequently overdrew her bank account, that she was by common standards grossly extravagant, and that she borrowed money f .n various friends. It was clear from the proof that the defendant was ignorant in fact of much of this and that his wife took specific precautions against his being informed of some of these actions on her part. Nevertheless the proof was accepted as material and relevant on the issue of the possession by defendant of an accumulation of funds, as to which logically it could not possibly have had probative value, because by the prosecution's own proof the defendant at all of the pertinent times had reported a much more than ample income, and had on deposit in his bank account amply sufficient funds to preclude the possibility that there was any necessity for his wife to borrow money or to overdraw her bank account.

Accordingly, it is submitted, regardless of the ostensible purpose, the obvious effect of the introduction of such evidence was to cause the jury gravely to be prejudiced against the defendant.

No decision of this Court or any other Court of Appeals having been found on this subject, it would seem that it is important for this Court to settle the question whether the testimony of a wife may by such indirection be put in evidence against her husband.

(3)

As shown in the foregoing Statement of the Case, much if not most of the evidence offered against petitioner at the trial came directly from his testimony before a Congressional Committee and from clues and leads originating therein and from material furnished by petitioner at the Committee's demand to the revenue agents who had been assigned to and were working for the Committee.

It does not appear that this Court has ever decided this specific question: whether the protection of witnesses before a Congressional Committee afforded by Section 3486 of Title 18 United States Code, as in effect prior to August 1954, relates only to the actual verbatim testimony given by the defendant before the Committee itself in regular session, or whether that protection extends to evidence furnished to accredited agents of the Committee acting under the Committee's aegis, and to the clues and leads deriving from the evidence given.

The decision by this Court in *Adams* v. *Maryland*, 347 U. S. 179, would seem to be, in principle, decisive, yet the Court below has decided otherwise, and the question would seem to be one which should be directly passed upon and decided by this Court.

Conclusion

Astonishing as it may seem at first blush that such a myriad of questions should be involved in a single case, the simple truth is that all are, which may possibly be explained by the intense anxiety and the driving desire to convict this defendant regardless of the adequacy or the absence of a sufficiency of proof, and that is why there are so many reasons for allowing the Writ and for the review of the judgment by this Court.

For which your petitioner will forever pray, etc.

Respectfully submitted,

JOSEPH D. NUNAN, JR.

By: RICHARD J. BURKE and
J. BERTRAM WEGMAN,
his Counsel.

Dated, November 2nd, 1956.

APPENDIX

Statutes and Regulations

Section 145(b), Internal Revenue Code of 1939

"Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Code of Federal Regulations, Title 26, Part 39, Section 39.22(a)-3

"If services are paid for with something other than money, the fair market value of the thing taken in payment is the amount to be included as income. If the services were rendered at a stipulated price, in the absence of evidence to the contrary such price will be presumed to be the fair value of the compensation received. If a corporation transfers to its employees its own stock as compensation for services rendered by the employee, the amount of such compensation to be included in the gross income of the employee is the fair market value of the stock at the time of the transfer."

Code of Federal Regulations, Title 26, Part 10, Section 81.10

"(c) *Stocks and bonds.* (1) The value of stocks and bonds, within the meaning of the Internal Revenue Code, is the fair market value per share or bond on the applicable valuation date. • • •

"(3) In the case of stocks and bonds which are not listed upon an exchange, but are dealt in through brokers, or have a market, the fair market value shall be determined by taking the mean between the highest and lowest selling prices as of the valuation date; * * *.

"(4) If actual sales are not available during a reasonable period beginning before and ending after the valuation date, the fair market value may be determined by taking a mean between the bona fide bid and asked prices on the nearest date before and the nearest date after the valuation date * * *."

Section 3486, Title 18, U. S. C.

"No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."

APPENDIX

Opinion of Court Below [1168a] *

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 81—October Term, 1955.

Argued January 17, 1956 Decided September 6, 1956.)

Docket No. 23476

UNITED STATES OF AMERICA,

Appellee,

against

JOSEPH D. NUNAN, JR.,

Defendant-Appellant.

Before:

MEDINA, HINCKS and WATERMAN,

Circuit Judges.

The judgment appealed from was rendered by the United States District Court for the Eastern District of New York. Walter Bruchhausen, Judge.

Defendant appeals from a judgment of conviction for income tax evasion for the calendar years 1946 to 1950, inclusive, in violation of Section 145(b) of the Internal Revenue Code. Affirmed.

---

* References thus are to pages of opinion as numbered by Clerk of Court below in certified copy of Joint Appendix and as referred to in Petition for Certiorari.

[1169a] LEONARD P. MOORE, United States Attorney, Eastern District of New York, Brooklyn, New York (Thomas C. Platt, Jr., Assistant United States Attorney, Brooklyn, New York, of Counsel), for appellee.

RICHARD J. BURKE and J. BERTRAM WEGMAN, New York City, for appellant.

MEDINA, *Circuit Judge:*

This is an appeal by Joseph D. Nunan, Jr. from a judgment of conviction entered upon the verdict of a jury finding him guilty of income tax evasion, in violation of Section 145(b) of the Internal Revenue Code of 1939, on each of five counts covering the calendar years 1946 to and including 1950. Appellant was sentenced to five years imprisonment on each of the five counts, the sentences to run concurrently, and a fine of $3000 on each of the five counts was imposed.

We are urged to reverse and dismiss the indictment or remand for a new trial. The points may be briefly summarized: (1) that there was insufficient evidence to establish the commission of the crime charged and that it was error to deny appellant's motion for a directed verdict; (2) that the motion to strike certain evidence of a long and continuous series of bank deposits in currency and payments to brokerage houses and others in currency should have been granted, because there was no basis for a finding that any of this cash constituted taxable income and because of the alleged prejudicial character of such proof; (3) that appellant was deprived of a fair trial by a variety of rulings admitting and excluding evidence, by allegedly erroneous instructions to the jury and refusals to charge as requested and by additional miscellaneous [1170a] rulings of one kind and another; (4) that the summation of the prosecutor was inflammatory, irrelevant and

improper; and (5) that it was error to deny appellant's motions to quash the indictment, to permit an inspection of the Grand Jury minutes and to suppress certain evidence. These points are proliferated and subdivided into so many separate contentions as to make it a tedious and profitless task to attempt further enumeration.

The validity of each of appellant's points depends as usual upon the factual background disclosed by the record, which at first blush seems extremely complicated and confusing. This seeming confusion, however, as we shall see, is due in no small measure to the fact that both sides leaned heavily on pre-trial statements made by appellant to the United States Attorney or to his assistants and to the Grand Jury, he having elected not to testify in his own defense at the trial. These various statements by appellant abound with inconsistencies, contradictions and ambiguities. Moreover, the large number of appellate court opinions of recent vintage in tax evasion cases have furnished a variety of labels or categories; and the zeal of counsel to fix one or another of these labels on the case, or to squeeze it into one or another of these so-called categories, has created the illusion that the basically simple issues are complicated and difficult of resolution.

Sufficiency of the Evidence

Appellant is a lawyer who, in addition to his law practice, served as a member of the New York State Legislature from 1930 to 1940. He functioned as Collector of Internal Revenue in Brooklyn, New York, from 1941 to 1944, when he became Commissioner of Internal Revenue in Washington, D. C., serving in that capacity until June 30, 1947. He had been a member of one law firm in New [1171a] York City for some time, and, after June 30, 1947, became a member of another law firm in Washington.

On February 2, 1951, by H. Res. 78, a Sub-committee of the House of Representatives was set up to "Investigate the Administration of the Internal Revenue Laws." Not long after this, and on June 27, 1951, appellant filed amended joint returns for himself and wife for the calendar years 1949 and 1950. In October, 1951, two Revenue Agents were assigned to do a special examination of appellant.

It soon developed that appellant had no checkbooks or cancelled checks for years prior to 1951. He said he had no personal books or records such as a taxpayer keeps and is required by law to keep in order to substantiate the data set forth in his income tax returns and facilitate verification by those charged with the duty of checking the various items. Moreover, he employed no accountant or other person to assist him but made out his returns himself and no other person has knowledge of the basis for the various amounts stated therein, except such as are mere reproductions of figures supplied by brokerage houses or the bookkeepers of his law firms. Schedules and details plainly required by the printed instructions on the returns were completely disregarded and omitted. Appellant's special knowledge of the tax laws which might have been inferred from his law practice and his experience as Collector of Internal Revenue and as Commissioner of Internal Revenue, with general superintendence over the collection of all taxes and the preparation of the regulations, blanks and forms, was said to be non-existent. He denied that he was a tax expert and said he became a federal revenue officer only by "the chance of politics." He is portrayed in his brief and in his various statements as a sort of political lawyer and business getter. And when the investigating Revenue Agents pointed out the difficulties caused by his lack of any sort of personal records [1172a] and asked him for a net worth statement, he refused to give it.

So the investigation proceeded and it was discovered that a large number of items of income had been entirely

omitted from his returns for the years 1946-1950. Some of these items were small, others were far from negligible in amount. In addition, a close examination of the bank ledgers disclosed a surprising number of deposits by appellant and his wife in currency. These were periodic and continuous, over the years covered by the indictment. The following is the list of such deposits in the year 1946:

March 9	$ 300.00
March 29	300.00
April 29	460.00
April 29	200.00
April 30	500.00
May 15	500.00
May 20	550.00
August 23	750.00
August 30	700.00
August 30	750.00
September 5	860.00
September 23	800.00
September 23	500.00
September 30	500.00
October 15	500.00
October 15	550.00
November 7	500.00
November 15	250.00
December 9	900.00
December 12	600.00
December 16	750.00
Total	$11,720.00

[1173a] When appellant bought some stock in 1946 he handed over to the brokerage house one hundred and sixty $100 bills and fourteen $50 bills. A further single payment of $11,253 in currency was made in the same year.

The amount paid to one dress shop during the prosecution years was $29,500; and of this amount $12,014.86 was paid in currency.

The cash deposits and expenditures during these years totalled $98,092.86; and for the years 1945 through 1950, the Revenue Agents unearthed $160,000 of deposits and expenditures in excess of appellant's reported net income.

Appellant's explanation defies credulity. The ledger sheets of his bank for the years prior to 1937 had been destroyed, so that no evidence was available to show what his balance was in the early thirties or at any time prior to 1937. He knew that safe deposit records showed that he rented a $10 box at the Chemical Safe Deposit Company on July 1, 1935. He said in substance that he had $170,000 in his bank account in March of 1933; that, fearful of the failure of the bank, and during the next two years, he made cash withdrawals in amounts ranging between $2000 and $5000, and put the cash in a metal box which was kept on a shelf in the bedroom in his home; that most of this was his wife's money, that he regarded the contents of the box as belonging to them both, and that she had a key; that in 1935 he decided to put the money in a safe deposit box, which was rented for the purpose; that from July, 1935 to the end of 1944 most of the cash was kept in this safe deposit box; and that, finally, he decided to put the money back in the bank, which he did piecemeal and that these piecemeal deposits made periodically over the years 1946 to 1950, which the government claims constituted taxable income, were not income at all but the same old $170,000 fund he started with, less whatever had been expended in [1174a] the meantime. This is the substance. There were countless variations as he was questioned by the United States Attorney or his assistants, or by the Foreman or by one of the Grand Jurors. The amount withdrawn from the Irving Trust Company was $100,000 or $150,000 or $125,000. The amount he left on deposit in his personal checking account, despite his fears, was $10,000 or $25,000

or $12,000. There were similar variations in his recollection of the amount of cash he kept in the safe in his law office, the amount kept at home, the amount in the metal box in the bedroom closet, and so on.

Naturally, the Revenue Agents and the prosecuting officers questioned appellant closely, especially after this belated and fantastic explanation was finally forthcoming. And appellant's pre-trial statements were supplemented by his wife's testimony at the trial. She had inherited a substantial sum from a rich uncle and an additional amount from her father. She said she had turned these funds over to appellant prior to 1932. It also appeared that appellant had made the practice over the years of turning his salary checks, as a legislator and as Collector and Commissioner, into cash; and he made other claims of accumulations of cash. We need not follow in detail the testimony of the Revenue Agent who described at the trial the course of the extensive investigation into each and every item in so far as estate and corporate and other documents and records and interviews with persons able to throw some light on real estate transfers, mortgages, and other matters, might reveal the true state of affairs. Suffice it to say that the net result, on the record as a whole, was evidence amply sufficient to warrant a finding by the jury that there never was any such fund of $170,000 or anything approximating such a sum in appellant's possession in the late twenties or early thirties.

[1175a] Another phase of the government's proof was a meticulous checking of all available items in order to arrive at an approximate figure representing the amount of appellant's taxable income. This was an arduous task, as it has proved to be in many other income tax evasion cases where the absence of records and the handling of large amounts of currency have made it impossible to do more than demonstrate that the taxable income involved greatly exceeded the amounts shown in the returns. The jury was evidently satisfied that the investigation was conducted in

good faith and that appellant was given the benefit of any and all circumstances favorable to his side of the case, as claimed by the Revenue Agent who testified. The evidence warranted such a finding.

The government claimed the following deficiencies for the prosecution years:

Year	*Net Income Deficiency*	*Tax Deficiency*
1946	$ 42,489.13	$33,079.50
1947	19,503,69	15,583,44
1948	23,599.48	14,641.46
1949	17,818.91	11,228.34
1950	23,840.76	16,553.86
Total	$127,251.97	$91,086.60

As to the specific items of taxable income which had been omitted from the returns, the substance of the defense was that they had been carelessly overlooked, that the amounts were not significant when compared with the totals of reported taxable income in each of the years in question, and that, if the proof of periodic cash deposits and expenditures was out of the case, the evidence of omission of specific items was insufficient to support a finding of wilful evasion.

[1176a] Accordingly, we turn to the specific items, which have significance not only in themselves, but for the light they throw upon the cash deposits and expenditures phase of the case.

The mere possession of large amounts of cash or the expenditure of large amounts of cash may well arouse suspicion and speculation, but it is well settled that proof of this, standing alone, will not suffice to establish that the amounts involved constitute taxable income. See Gleckman v. United States, 8 Cir., 80 F. 2d 394, 399, cert. denied, 297 U. S. 709; Graves v. United States, 10 Cir., 191 F. 2d 579,

582; cf. Holland v. United States, 348 U. S. 121; Smith v. United States, 348 U. S. 147 (semble). But when unreported receipts in the indictment years are established by independent evidence, as here, the proof that the receipts derived from a taxable source may be made by proof of a likely source of taxable income, as in United States v. Johnson, 319 U. S. 503; Capone v. United States, 7 Cir., 51 F. 2d 609; Guzik v. United States, 7 Cir., 54 F. 2d 618; United States v. Costello, 2 Cir., 221 F. 2d 668; United States v. Ford, 2 Cir., August 6, 1956, —— F. 2d ——. The variations of this pattern are legion but a common feature is the necessity for concealment and the method of concealment not infrequently is the use of currency.

Here, as we shall see, there were proofs from which the jury might find that appellant had received fees not included in the earnings of his two law partnerships. Because "of the chance of politics," he was in a position of unusual prominence, in contact with government officials of every rank and stature, and obviously eager and willing to harvest the crop when it was ripe. As a member of two law firms he shared largely in huge partnership income. But he did not hesitate to turn his position as a public figure to account in other ways. And the number of legal [1177a] fees he concealed not only from the tax authorities but also from his law partners has a special relevancy, in view of his extrajudicial statement that his professional income was reported on the basis of his earnings as they appeared on the partnership books.

In the fall of 1947 Brown & Bigelow Company desired to market some of its securities through Otis & Co. The stockholders' meeting was scheduled for December 6th, and it was necessary to secure a "closing agreement" from the Bureau of Internal Revenue prior to the meeting. The lawyers for the company went to Washington and saw the officials whose duty it was to act in the matter, but were informed that there were so many similar applications ahead of theirs that prompt action was impossible. Ap-

pellant, who had ceased to be Commissioner of Internal Revenue about six months previously was retained and in a few hours, as the result of a telephone call or interview, the business was done, and appellant was paid a fee of $25,000. The details are interesting. After agreeing on a fee of $25,000, appellant acceded to the suggestion that this be paid in stock, which the president of Brown & Bigelow Company had bought in at $9.50 a share. Accordingly, a computation was made at the nearest approximation; 2630 shares at $9.50 came to $24,985.00. A bill dated December 28, 1947, was made out by appellant in that amount, duly receipted and sent out to Brown & Bigelow Company in Minnesota; the 2630 shares were forwarded to appellant on January 2, 1948.

But the bill is not on the billhead of his New York law firm but on an old form of personal, Joseph D. Nunan, Jr., billhead previously used, with the old address crossed out and 55 Liberty Street substituted, and the stock was forwarded to appellant, not at his law office, but at "604 Shore Road, Douglaston, Long Island." The firm bookkeeper had [1178a] no knowledge of the matter but appellant claims the jury could have found that other members of the firm knew of this fee and were willing to have appellant keep it all. But the jury may well have found that appellant concealed the fee from his partners. True, one of the partners testified that appellant had told him that Brown & Bigelow Company had "given" him some stock, and on cross-examination he said he "understood" the firm would not receive any of the stock. But this is far from saying that he knew of the services rendered by appellant, or that a fee of $25,000 had been agreed upon and paid. Moreover, the credibility of every one of the witnesses constituted an issue in the case.

It is claimed by appellant that this Brown & Bigelow Company fee is included in his 1948 joint return under the heading of "Other income—$22,500." For the purposes of computing the amount of tax evaded by appellant in 1948

the government was willing to make its calculations accordingly. But there is no possible way of making $22,500 equal $24,985, nor did appellant in any of his various statements give any explanation.

In December, 1949, the Unexcelled Chemical Company retained appellant's firm and paid a retainer of $1500, which was entered on the firm books. But C. D. Waller, President of the Company, purchased 1000 shares of bearer stock of Unexcelled, endorsed in blank, at a cost of $2997.50, for the account of "Mr. Joseph D. Nunan, Jr., care of C. D. Waller, Stamford, Connecticut." In one of his statements appellant claimed the client had said "we are not in a very strong cash position—would you take stock for a fee," and that he put the stock in the safe and "we forgot about it." But no record of the receipt of the stock was made in the firm books and nothing happened until two weeks after appellant was interviewed by the Revenue [1179a] Agents in 1951, when the stock was sold and the partnership included the proceeds as income for that year. There was testimony by one of appellant's partners to the effect that this was a sort of "contingent" fee not to be taken "until it was earned," but this, under the circumstances might not have seemed convincing to the jury.

In 1950 Anheuser-Busch, Inc. was about to complete the construction of a new $30,000,000 brewery in Newark, New Jersey. Foreseeing the possibility of complications over "permits and things of that sort" appellant was "put on a retainer" of $500 a month with the understanding that he might be called upon at any time "for legal advice and counsel." He received three monthly payments, aggregating $1500, in 1950. But none of this ever reached his law firm, nor is there any evidence that any of the partners ever knew anything about it. Appellant's explanation before the Grand Jury was that he was hired not to perform legal services but to "try to get * * * Anheuser-Busch beer into certain places in New York."

No item of $1500 from Anheuser-Busch, Inc., appears in appellant's 1950 return. In one of his statements appellant said two of the payments were included under the description "Other income—$2250" in the original 1950 return and a third in his amended return, filed June 27, 1951, under the heading "Other income—$2750."

Appellant represented a Dr. Jones who had an income tax problem and appellant claimed to have done considerable work on the matter personally. The fee was $7500 but appellant had certain charities he wanted to help so the fee was paid by a check of $6000 to the order of his law firm, and two additional checks for $500 and $1000 respectively, drawn to appellant's order and endorsed over to the charities in which he was interested. The jury would have been justified on the evidence in concluding not only that the [1180a] firm lost its share of the $1500 portion of the fee, but that there was at least the possibility that appellant took the charitable deduction twice, one by the simple method above described, and again when he tried to remember, but made no effort to enumerate in detail, as required by the instructions, his gifts to charity during the year, as he filled out his income tax form. He made up a sort of estimate out of his head when writing out his returns, and set down a figure in each return after writing "various church & charities." This figure varied from $5100 in the 1946 return, $6050 in 1947, $9350 in 1948, $9600 in 1949, to $11,360 in 1950. He said he "didn't think" he included the two Dr. Jones items in his charitable deductions for that year.

There was a forwarding fee due from the law firm of Glass & Lynch. This was one of the matters which appellant and his firm split on a 50-50 basis. He sometimes received the fee and remitted the firm share later. He received two checks, one dated February 28, 1944, for $3333.33 and the other dated November 19, 1945, for $8138.82. The payments to the firm, however, were not 50-50. Of the amount of the first check appellant remitted $1500, and of

the other he remitted $2830. The result was not only a diminution of the amount owing to the firm, but the government lost income taxes both on appellant's share of what he withheld, or $1406.08, and also on the firm's share, or another $1406.07, making a total of $2812.15 on which no income taxes were paid. Appellant reported his income from this transaction only on the basis of that fraction of the fee which he remitted to his law firm. It is futile for counsel to make the explanation in appellant's brief that there may have been disbursements deducted by appellant. No such explanation was made at any time by appellant, nor was there any testimony on the subject, and the even figures of appellant's checks do not indicate any such deduction.

[1181a] Perhaps appellant's lack of books and records and his giving of lump sum totals here and there in persistent disregard of the printed instructions on the returns, and his omissions to give his firm the share of legal fees to which they were entitled, were due to the fact that appellant was so busy that he developed careless habits. But the jury might have found that there were just too many of these slip-ups, that an honest man with his huge income would naturally keep some sort of books and records and procure the usual assistance in preparing his income tax returns. From the circumstances of the case as a whole the jury was well justified in drawing the inference of wilful evasion.

The way appellant handled the fees above described had a bearing on the sources from which he derived the large amounts of currency deposited and expended. If he withheld from his firm and from the government information of fees which he was paid by check, how much more likely was he to withhold information of fees paid in currency. Especially as such opportunities for enrichment presented themselves as in the Brown & Bigelow matter, where contact with an official almost in the twinkling of an eye resulted in a fee of $25,000. It would be far from strange if services of this character were paid for in cash.

In any event, and before we set forth a summary of the evidence concerning the numerous other omitted items, it may be well to say that it is now apparent, we think, that the interrelation between the currency phase of the case and the so-called specific items is such that the trial judge would have erred grievously and to the prejudice of the government's case had he stricken from the case all evidence of the periodic cash deposits and expenditures, and appellant's explanations thereof.

Despite the usual explicit statements from his broker he failed to report a capital gain of $544.80 in 1950. He mailed [1182a] reminders every year to Dr. Kiffney specifying the amount of principal and interest due on a mortgage but failed to report receipt of any of the interest payments, which aggregated $2278.52 in the five prosecution years. He was paid $1800 which he won on a wager in 1948, but this was not included in his return. He explained that his gambling losses exceeded this amount in that year, although he must have known that the details of such transactions must be specified if the losses are to be allowed against the gains. There was a persistent and continuous failure in each of the prosecution years to report the full amount in dividends received. In April, 1946, the senior member of his law firm died and appellant and another partner agreed to contribute together to the firm the sum of $28,000. As appellant's undistributed earnings for prior years amounted only to $8,474.52, the balance of his $14,000 contribution, or $5525.48, constituted earnings which he should have reported as such, as they were not otherwise included in his partnership earnings. It is claimed that this is the sort of disputed item one might come across in a civil litigation, but it is hard to see any plausible ground for any bona fide dispute. A few omitted directors' fees make up the balance of the $23,536.30 of specific items of unreported income.

None of these items can be considered in vacuo. Nor does the sum of them tell the story. Viewed in perspective against the background of the case as a whole we cannot say that the evidence required a ruling that the jury must render a verdict of acquittal. The showing by the government must warrant a finding that the amount of the tax evaded is substantial. Tinkoff v. United States, D. C. Cir., 86 F. 2d 868; United States v. Schenck, 2 Cir., 126 F. 2d 702; Graves v. United States, 10 Cir., 191 F. 2d 579. But this is not measured in terms of gross or net income nor by any particular percentage of the tax shown to be due [1183a] and payable. All the attendant circumstances must be taken into consideration. Here the total gross income reported by appellant in 1946 was $67,823.57 and in 1950, $143,239.00. But a few thousand dollars of omissions of taxable income may in a given case warrant criminal prosecution, depending on the circumstances of the particular case. Otherwise the rich and powerful could evade the income tax law with impunity. Here, even if the jury had been unable to agree with the contentions of the government to the effect that the cash deposits and disbursements constituted, to the extent alleged, taxable income, still a verdict of guilty would have been warranted by the proof of specific unreported items, viewed in the light of the evidence taken as a whole.

The most serious contention, advanced by appellant in different ways, is that the absence of a statement of his net worth at the beginning of the prosecution period is fatal and that there should at least be a new trial restricted to proofs concerning the specific items of unreported income. It is said that without some proof of appellant's assets prior to the period of periodic and continuous currency bank deposits and expenditures in currency, the effect of the method of proof pursued here deprived appellant of the presumption of innocence and placed upon him the burden of showing that he had not received taxable income in excess of that shown on his returns for the

years 1946-1950. We are urged to hold that the requirements of the net worth cases (Holland v. United States, supra; Friedberg v. United States, 348 U. S. 142; Smith v. United States, supra; United States v. Calderon, 348 U. S. 160) must be applied.

But the answer to all this is that each tax evasion case must rest on its own bottom. This is not a net worth case. All the law requires is that there be proof sufficient to establish that there has been a receipt of taxable income [1184a] by the accused and a wilful evasion of the tax thereon. It is not necessary to prove that there was a particular amount of tax evaded nor need the computations be exact in an accounting sense. The claim that there is no proof of any probable income-producing source for the cash is completely refuted by the evidence which we have already partially reviewed. The relationship between the various phases of the evidence and the attendant circumstances, such as the complete absence of personal books and records, amply justified a finding by the jury that each of the parts fitted into a pattern of substantial tax evasion. To split the case apart would be to emasculate it.

While it is confidently asserted that there has been no refutation by the government of appellant's statement about his large cash hoard, the fact is that the testimony of the Revenue Agent who testified demonstrated, or at the very least warranted an inference by the jury, that the alleged sources of at least a part of the hoard were fabricated and in many instances exaggerated. Indeed, the description of the metal box and the transfers of cash to the safe deposit box and the curious piecemeal redeposit of the funds in the bank is so fantastic as to provide the basis for its own refutation.

Accordingly, we hold that the motion to strike the evidence of periodic cash deposits and expenditures and appellant's explanations thereof was properly denied, that the state of the evidence did not warrant the granting of the motion for a directed verdict of acquittal, that there

was more than ample proof of wilful tax evasion and that the proof relative to the specific items of taxable income which were omitted from the returns in the light of the evidence as a whole was of itself sufficient to support the verdict.

The Instructions to the Jury [1185a]

Many of the objections to the charge have already been disposed of as they merely repeat contentions advanced in connection with the claim that the evidence was insufficient to support the verdict. There was no occasion to instruct the jury that "the prosecution must establish defendant's net asset position at the commencement of the period," nor to give "a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available, both for and against the accused." Holland v. United States, supra, at p. 129. See Gleckman v. United States, supra; Graves v. United States, supra; Stinnett v. United States, 4 Cir., 173 F. 2d 129.

The instructions relative to the crucial issues were simple and clear. Had appellant received income in each of the years in question upon which there was an income tax due which was wilfully evaded; the exact amount of unreported income need not be established by the government to a mathematical certainty, but there must be a substantial evasion of the tax due.

Much is made of the fact that the trial judge refused appellant's Request 18, which reads as follows:

> The government must establish beyond a reasonable doubt that the items claimed to be income to the defendant were income in the years in question. On this you may not speculate nor may the government ask you to speculate or guess. If you believe that the cash deposits and cash expenditures during the years 1946 to 1950 came from an accumulation of cash, accumulated prior to 1946, as stated in substance by defendant, then such cash is not income

in the years in question and the defendant was not required to report such cash in the years in question nor was he liable for any income tax on such cash.

[1186a] While the trial judge did not adopt the exact language thus proffered, nor did he cover the same matters in sequence, his instructions adequately and clearly covered the substance of each of the propositions therein contained.

With reference to the first sentence of Request 18, the court charged, "The government must prove to you beyond a reasonable doubt that the defendant wilfully avoided the payment of taxes known to be due upon income received during the years specified in the indictment." Moreover, the jury were instructed not to speculate or guess.

Of course it was important that the jury should know that if the cash deposits and cash expenditures made in the indictment years came from currency accumulated by appellant in prior years, as claimed by appellant, he was not liable for any income tax on this cash. But this was not an issue which crept into the case sub silentio; the pros and cons were referred to again and again in the testimony of various witnesses and in the arguments of counsel. It was as plain as a pikestaff that if the currency deposits and expenditures came from cash in appellant's possession prior to 1946, then this same cash could not be found to be taxable income in the prosecution years. That the jury might have labored under some misunderstanding on the subject seems no more than a hypothetical possibility, too remote from the realities of the trial for serious consideration. In any event, the short answer is that the instructions sufficiently covered the point.

Thus the jury were told that the burden rested exclusively on the government, that "the defendant need not prove to you that expenditures were made from prior accumulations and a source other than taxable income for the years specified in the indictment." And, in a portion of the instructions quoted below, it was made plain to the

jury that they were to decide whether appellant had unreported income on which the tax was wilfully evaded, "or whether or [1187a] not the money was received by the defendant prior to 1946 and therefore is not income."

But appellant contends that certain language in the charge may well have been understood by the jury as a statement "that the cash deposits in banks and the expenditures had been proved by evidence to constitute the financial returns from appellant's occupation." No such inference, we think, is justified when this portion of the charge is read in its entirety. It is as follows:

> The Government has submitted proof in support of its charges of evasion of income taxes and understatements of income by evidence that the defendant had a lucrative occupation, the financial returns from which were reflected in bank deposits, in known receipts and expenditures. It is claimed that the total of these, eliminating duplications, was in excess of the reported income. The claimed differential between the two is the alleged understatement upon which the claimed differences are based.
>
> It is your function, members of the jury, to determine whether there was such a differential and if the differential was income and whether the tax thereon was wilfully evaded. It is for you to determine whether or not upon all of the evidence the defendant had unreported income, the tax whereon was or was not wilfully evaded, or whether or not the money was received by the defendant prior to 1946 and therefore is not income.

Thus, after stating the claim of the prosecution, the trial judge left it to the jury to say whether there was unreported income or whether, as asserted by appellant, "the money was received by the defendant prior to 1946 and therefore is not income."

[1188a] Had it been supposed that this was any more than a statement of the broad outlines of the claims of the parties on this phase of the case counsel should have drawn the matter to the attention of the trial judge and requested a clarification, but he did not.

Deductions, Contributions and Miscellanea

Exception was taken, however, to a statement to the jury with reference to the $1800 gambling gain above referred to, that "gambling losses are not deductible unless so claimed and supported." This statement was in all respects accurate. Appellant, after all his experience as a lawyer who handled income tax matters for clients at least occasionally, and after his service as Collector and as Commissioner of Internal Revenue, must have known that he was not entitled to deduct alleged gambling losses without claiming them on the face of the return. This was part of the background the jury was called upon to consider.

It is said that the trial judge, even if not specifically requested to do so, was under a duty to explain to the jury that if appellant honestly believed no tax was due on this item of $1800 they could not find that appellant wilfully evaded the tax thereon. But there is nothing in this. The instructions on the subject of wilfulness were lucid and explicit; the jury must have understood that what was said on that subject applied to each and every item of alleged unreported taxable income.

A few other miscellaneous points may well be disposed of here, as they have to do with certain requirements of law which were relevant to various phases of the case but which appellant says were brought in to his prejudice.

From the very outset of the case, when the returns and amended returns were being offered in evidence, appellant objected to reference to the printed instructions requiring the enumeration of "deductions and contributions," no [1189a] specific items appearing on the returns and no

attached schedules. This particular contention was based upon the statement in the government's Bill of Particulars, "No disallowance of deductions or exemptions claimed."

But it was not the function of the Bill of Particulars to set forth every detail of what the jury was warranted in concluding was appellant's elaborate and ingenious scheme of operations. The lack of any personal books or records, the making out of the returns himself, the persistent disregard of instructions obviously designed to prevent tax evasion and the use of odd lump sums which could be said to mean almost anything desired if, as and when the evil day arrived and Revenue Agents began to investigate, may well have appeared to the jury, in the light of the evidence as a whole, as part and parcel of appellant's method of tax evasion.

There was nothing in or out of the Bill of Particulars which should have led the trial judge to rule out evidence that appellant had retained no record of his contributions to charities, that he never kept any record of his cash contributions, that he could not identify any of the contributions from memory and that aggregates in round figures in his returns, characterized as "Various church & charities" were no more than guesses or estimates. Naturally the prosecutor commented on this item in his summation and he was plainly entitled to do so.

There was never any concession by the prosecutor that the deductions were "proper," as claimed by appellant, or that they were properly set forth on the returns. Nor did appellant ever claim that the two checks of $1,000 and $500 paid on the Dr. Jones' fee, were included in his total of contributions for the year in which he endorsed those checks over to the two charities in which he said he was interested.

[1190a] An analogous objection is made with reference to the $24,985 fee for expediting the rendition of the "closing agreement" in the Brown & Bigelow Company matter.

When appellant said the item "Other income—$22,500" in his 1948 return represented this item, the government was willing to make its calculations of the amount of tax claimed to be evaded at $2485, the difference between the fee received and the amount claimed to be reported. But this furnished no basis for keeping the full details of the transaction from the jury, as they were relevant to the periodic currency deposits and expenditures phase of the case, and especially so on the issue of motive, intent and wilfulness.

Nor was there error in rejecting the proffered evidence of the bid and asked prices of the Brown & Bigelow Company stock on a when, as and if issued basis, on January 5, 1948, the mean of which is said to be 8⅝ rather than the 9½, which was the basis used when the fee was agreed upon. This evidence could have served no other purpose than to confuse the jury. All the evidence in the case showed an agreed fee of $24,985, the amount of appellant's receipted bill. He made no statement at any time to the effect that he intended to enter on his return the amount the stock might be deemed worth according to the market quotations, nor was any evidence produced on his behalf to indicate that he did so. No calculation made on the basis of the alleged bid and asked prices on January 5, 1948, could be made to come to $22,500.

Moreover, the argument made in the prosecutor's summation, that this fee was not disclosed to appellant's partners, was amply justified, as indicated in an earlier portion of this opinion.

Considerable argument is devoted to the amended returns, two of which were filed on June 27, 1951, shortly after the passage of the Resolution of the House of Representatives, [1191a] setting up the Sub-committee to "Investigate the Administration of the Internal Revenue Laws," above referred to, and shortly before the two Revenue Agents were assigned to investigate appellant's personal income tax situation. The relevancy of these amended returns to the government's case will appear from a single illustration.

In 1949, one of the officers of American Lithofold Corporation, which manufactured business forms, conferred with appellant over the possibility of getting business for the firm through the medium of appellant's "prominence in the neighborhood," meaning New York City. Appellant was accordingly employed and made a vice-president of the company. Some cards were printed with appellant's name as vice-president and he went around to see some customers and sent out a number of letters. For these services he was paid on February 28, 1949, $750, on March 31, 1949, $750 and on April 30, 1949, $750. A further payment was made to appellant of $1200 in 1950. The 1949 return, as originally filed on January 16, 1950, made no reference to the amounts received from American Lithofold Corporation in that year. In the 1950 return, filed on January 12, 1951, there is an unexplained lump sum statement, "Other income—$2250." The amended return for 1949, filed on June 27, 1951, contains a new item, "Other income—$2250," the equivalent of the three $750 payments above described; and, in the amended 1950 return, filed June 27, 1951, the original statement, "Other income—$2250" is raised to "Other income—$2750." Appellant claimed that the 1949 amended return of "Other income—$2250" represented the payments received from American Lithofold Corporation in 1949. His claim about the "Other income—$2750" in the 1950 amended return is obscure to us, partly because of his answers during the investigation relative to the Anheuser-Busch payments referred to in a foregoing portion of this opinion.

[1192a] In any event, the filing of the amended returns under the circumstances could give appellant no immunity on account of any prior wilful misstatement or omission of taxable income. It was for the jury to consider these items of proof together with all the other evidence in the case and give them such probative weight on the issues as the jury might decide upon.

Much is made of the fact that appellant had a right to file amended returns at any time, and, although not included in the requests for instructions submitted prior to the charge by the trial judge, counsel in a colloquy in the absence of the jury, relative to exceptions to the charge as given, requested the trial judge to supplement his charge by a further instruction "that an amended return does not have to be filed before March 15th, but can be filed at any time." The occasion for this is said to be that in his summmation the prosecutor had said: "Now for that year, 1949, when the return was filed on January 16th—and please contrast this with the first one where, on March 12th, he filed an amended return (1946), and we took the amended return because he had a right to file an amended return at any time before the 15th of March."

But no objection had been made to this statement by the prosecutor, whch was of trifling significance, and the trial judge wisely, as we think, thought it would not be helpful to emphasize such a point just before the jury retired for its deliberations; and he remarked "if you had made objection at the time we could have said something about it."

We can see no error here. Nothing but confusion and distraction from the main issues could have resulted from the discussion at that stage of the trial of such a minor point. It was well within the discretion of the trial judge to grant or refuse the request.

[1193a] Two exhibits, consisting of a letter from Gaylord Container Corporation, dated March 15, 1946, requesting a ruling on a proposed stock split-up, and a reply acceding to the request, signed by appellant as Commissioner, dated March 27, 1946, were received in evidence subject to connection. They were not read or shown to the jury; the connection failed to materialize and they were stricken together with the testimony of the witness who identified them. The prosecutor made no comment about these exhibits, and the instructions of the trial judge to the jury to disregard the exhibits and the testimony amply

protected appellant. United States v. On Lee, 2 Cir., 193 F. 2d 306, 310, aff'd, 343 U. S. 747; Berlin v. United States, 3 Cir., 14 F. 2d 497, 499; Looker v. United States, 2 Cir., 240 Fed. 932.

It is alleged that the trial judge erred in receiving over objection proof of borrowings by appellant's wife, overdrawings of her bank account and similar evidence which, according to the claim of the prosecution, constituted conduct inconsistent with the existence of the cash hoard in the metal box in the bedroom closet. We are told that the wife was extravagant, that she concealed her borrowings from appellant and that what she did has no relevancy to the charge against appellant.

But appellant stated that the wife turned over to him the money she inherited from her uncle and from her father, that he considered the accumulation of cash in the metal box to belong to both of them and that she had a key to the box. Moreover, appellant stated that she had no income of her own and that all her cash deposits and cash expenditures came from currency he gave to her. Under these circumstances we think the evidence of her borrowings was admissible. 8 Wigmore, Evidence (3rd Ed., 1940) Section 2232(1).

[1194a] *The Prosecutor's Summation*

Appellant's brief contains some twenty odd specifications of what are alleged to be improprieties of the prosecutor in his closing statement to the jury. In a few instances objection was made at the time by interrupting the summation, but nothing was said about most of these supposed improprieties until a motion for a new trial was made later. There are six instances of alleged inflammatory appeals to prejudice, three "intimations" of personal knowledge on the part of the prosecutor of facts either not in evidence or contrary to the evidence, and a large number of statements or arguments which appellant claims are without support in the evidence or contrary to the evidence or which called upon the jury to speculate.

Most of the items relied upon are matters of trivial consequence. Counsel was entitled to argue the inferences to be drawn from the proofs, and the jury was instructed that statements by the lawyers in summation are not proof and that the recollection of the evidence by the jury was what they should take into consideration in arriving at their verdict.

The so-called inflammatory appeals turn out to be nothing of the kind. What was said about the Brown & Bigelow Company fee and how it was earned was not only proper but necessary, if the jury were to understand the significance, according to the prosecution's theory of the case, of the legal fees earned by appellant and not turned over to his law firm. Appellant still insists that the firm knew about this fee but the evidence could have justified a finding by the jury to the contrary, as we have already pointed out. So also, with reference to the prosecutor's comments relative to appellant's claim that the moneys he received from Anheuser-Busch were not legal fees but for prospective efforts to get Stevens to sell Anheuser-Busch beer at [1195a] the ball parks and race tracks. We have already adverted to appellant's claim that he was not a tax expert and to his method of entering lump sums in his returns, despite the plain printed instructions which required details and annexed schedules, if necessary. It was perfectly proper for the prosecutor to refer to the fact that appellant was "top man," as Commissioner of Internal Revenue for part of the prosecution period, and that by law he was responsible for the collection of all taxes in the United States.

True it is that the prosecutor argued that the large amount of currency claimed by appellant to be in his accumulated hoard would not go in a $10 safe deposit box, although the precise dimensions of the box had not been proved. But this was fair argument, and the same may be said of his statement that he too graduated from law school in 1923 and knew that the remuneration young lawyers received in those days "was never as much as we

thought would be commensurate." He also said that after the Bank Holiday in 1933 none of the large banks in New York City had any difficulty. This was objected to and there was a colloquy in which the trial judge said he would leave it to the jury to recall what the testimony was. Things of this sort come up in practically every trial and we find no basis whatever for any finding of impropriety.

In his summation defense counsel had argued that the government should have had one of its agents go to the bedroom closet in the Douglaston house, where appellant lived when he said he kept the metal box with the cash there, and take measurements and photographs. In response to this the prosecutor commented: "In his summation, Mr. Burke criticized me for not taking photographs and measurements. Mr. Burke would have been the first to have objected to my photographs, objected because they would have been taken in 1954 and would not fairly represent a thing twenty years ago." This was legitimate argument; [1196a] and we find no evidence that the prosecutor "went so far as to brandish before the jury photographs never identified or offered."

There is no merit in any of the claims of impropriety on the part of the prosecutor; and we think it unnecessary further to discuss this phase of the case.

The Motion to Suppress

Reversal of the judgment of conviction is also urged on the ground that it was obtained by the admission of evidence, the use of which was prohibited by 18 U. S. C. § 3486, since amended.[1] This issue was raised by a motion to suppress, argued before trial and renewed at the commencement of the trial, and by objections to the introduction of certain evidence. We hold that the motion was properly denied, and the objections were properly overruled. The statute then provided:

---

[1] Act of August 20, 1954, c. 769, § 1, 68 Stat. 745.

> No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.

Appellant testified before the King Committee, above referred to, on September 12, 1951 and March 18, 1952 but none of this testimony was offered in evidence at the trial. But appellant was interrogated privately on many occasions by the two revenue agents assigned to investigate his income tax returns and he made certain records [1197a] available to them, such as the books and records of his law firms, certain photostatic copies of existing records of his bank account and records of his accounts with brokerage houses.

The substance of appellant's contention on this phase of the case is that the revenue agents were acting as agents of the King Committee, that what he told them from time to time in the course of their investigation and the documents he made available to them served as clues or leads to other items of proof, and that all this came within the purview of the immunity statute quoted above.

The testimony of Revenue Agent Saldana at the trial indicated that he and his fellow investigator were not connected with the King Committee but that, after their investigation was under way, they were told to cooperate with the King Committee by answering any questions put to them by the Committee and they had done so. There is no dispute about the fact that, at their first interview with appellant, they told him they desired to make a reexamination of certain of his income tax returns, "on behalf of the Bureau of Internal Revenue."

But we need not pursue the question of whether, and to what extent, the two revenue agents may be said to have in some way represented the King Committee, as we agree with the interpretation of the statute made by the Court of Appeals for the District of Columbia in United States v. Brennan, 214 F. 2d 268, cert. denied 348 U. S. 268. There counsel for the Committee informed the defendant "that the Committee, acting through me, would like to see you and ask some questions about the facts." Defendant appeared before Committee counsel with his lawyer, who took the position that none of his client's answers could be used against him in any criminal proceeding, and the answers were given. The court held, nevertheless, that the motion to suppress must be denied, as Committee counsel [1198a] was "not an organic part of the Committee, which can be composed only of members of Congress," and the statute had no application to statements made to agents or employees of the Committee, which did not constitute "testimony given by a witness * * * before any committee of either House." We do not see how we can hold otherwise, in view of the explicit wording of the statute.

The Motions to Quash the Indictment and Inspect the Grand Jury Minutes

The appeal also brings up for review an order of Chief Judge Inch, denying appellant's motion to quash the indictment, or, in the alternative, to permit an inspection of the minutes of the proceedings before the Grand Jury.

On February 18, 1952, the Grand Jury was impanelled in the Eastern District of New York and commenced to hear witnesses; the indictment against appellant was returned on December 2, 1952; the motion to quash the indictment or inspect the minutes of the Grand Jury was denied on March 19, 1953; the trial commenced on June 8, 1954.

The motion to quash is based upon: (1) a series of sensational newspaper articles and radio and television pub-

licity, between February and September 1952, that is to say, both prior to and during the sessions of the Grand Jury; (2) certain incidents which are said to evidence a controversy between the legislative and executive branches of the government relating to the investigation of appellant's conduct, culminating in the service of a Grand Jury subpoena on Congressman Kean, who gave certain testimony, all of which is claimed to have violated appellant's right to an impartial tribunal, under the Fifth and Sixth Amendments; and (3) the alleged absence of any competent or adequate evidence to warrant the return of the indictment.

[1199a] As the various disclosures brought to light by the King Committee affected some of the highest ranking officials in the Internal Revenue Service, including appellant, it was inevitable that the resulting publicity would be sensational in character, and much of it was unfair, misleading, and, at least to some extent, untrue and unwarranted. But we are not dealing here with alleged bias or prejudice by a petit jury, caused by widespread publicity during or just prior to a trial of the issues, as was the case in Meyer v. Cadwalader, E. D. Pa., 49 Fed. 32 and Griffin v. United States, 3 Cir., 295 Fed. 437. In such a situation much would depend upon the character of the publicity, proof that it was of such a nature as to be likely to make an impression on the jurors, and the steps taken by the trial judge to mitigate or remove its effect. Instructions that jurors must avoid reading newspapers or listening to or looking at radio and television commentators and that their verdict must be based solely on the evidence introduced in the case in court, will generally suffice. But there must be a careful appraisal of the possibility or likelihood of extraneous influence. And, indeed, there is good sense in this, since petit jurors must remain passive spectators of the court room drama.

But a Grand Jury is not confined to a passive role, but may and often should proceed on its own initiative. 4 Stanford L. Rev. 68, 69, 77-8; Dession, From Indictment to In-

formation, 42 Yale L. J. 163, 176. That it is induced to such action by newspaper reports forms a continuum with its historic function of ferreting out crime and corruption, and is in no way inconsistent with its duty to decide on and in accordance with the evidence adduced before it.

Doubtless the Chairman and members of the King Committee, charged with the duty to "Investigate the Administration of the Internal Revenue Laws," feared that the proceedings before the Grand Jury might be used to "whitewash" [1200a] appellant and others. We are not concerned here with the removal of the Committee files to Washington, and their subsequent return. Nor was there the slightest impropriety on the part of the Grand Jury in bringing Congressman Kean before it and hearing his testimony. Indeed, this would seem to have been its plain duty in the premises.

We agree with the finding of Chief Judge Inch that the record is barren of any evidence that the grand jurors were prejudiced or coerced by the publicity or by anything said or done by any member of the King Committee. Quite to the contrary, there is every reason to suppose that the Foreman and other members of the Grand Jury pursued the investigation conscientiously and with diligence. Their refusal to be intimidated by what they may have considered to be legislative sound and fury, is commendable. It must not be forgotten that they heard witnesses over a considerable period, and did not return the indictment for some months after appellant had testified before them and provided out of his own mouth evidence which was far from lacking in probative force. And appellant has made much of the fact that at no time did he refuse to answer any question on the ground that the answer might tend to incriminate him.

We find no merit whatever in the contention that there was insufficient evidence before the Grand Jury to justify the return of the indictment. It may well be that some of the evidence was not properly received, but it is well estab-

lished law that the submission to a grand jury of some incompetent proof is not a ground for dismissing the indictment. Holt v. United States, 218 U. S. 245; Cox v. Vaught, 10 Cir., 52 F. 2d 562; United States v. Pearlman, S. D. N. Y., 247 Fed. 158; Joyce, Indictments § 138 (2d ed., Blakemore, 1924); cf. Costello v. United States, 350 U. S. 359, affirming 2 Cir., 221 F. 2d 268.

[1201a] Accordingly, we do not reach and need not decide the question of whether 18 U. S. C. § 3486, above referred to, applies to grand jury investigations. It was held in United States v. Smyth, N. D., Cal., 104 F. Supp. 283, 307, that the statute only forbade the use on a trial testimony taken before a Congressional Committee. We have some doubt about the soundness of this ruling. But here, in addition to the excerpts from appellant's testimony before the King Committee, which were read to the Grand Jury, the record discloses that the Grand Jury had considerable other evidence before it, which we find it unnecessary to catalogue.

An effort is made by appellant to eliminate from consideration on this point testimony before the Grand Jury of the Revenue Agent Saldana, who testified at great length at the trial. The basis for this particular argument is the following single question and answer contained in Saldana's testimony before the King Committee, given at a time when the Grand Jury was midway in its investigation:

> Q. Do you actually have any evidence that the $97,000 expended or deposited during the five years constituted unreported income to Mr. Nunan upon which any taxes were due? A. We do not.

But this is the old story of selecting a brief quotation here or there and disregarding the rest. There appears to have been evidence before the Grand Jury of several of the specific items of unreported income; at the time Saldana gave the answer to the question above quoted the grand jury investigation was incomplete; and it seems not im-

probable that the witness meant merely that he had no direct, as contrasted with circumstantial evidence, that the amount of the cash deposits and expenditures constituted unreported income.

Accordingly, we cannot say that appellant has overcome the strong presumption of regularity accorded to the de- [1202a] liberations and findings of grand juries, e.g., United States v. Gooding, 12 Wheat. 460; Radford v. United States, 2 Cir., 129 Fed. 49; Nanfito v. United States, 8 Cir., 20 F. 2d 376; Joyce, Indictments § 140 (2d ed., Blakemore, 1924), or that the district judge abused his discretion in denying the motion to quash.

Nor would we be warranted in holding that it was an abuse of discretion to deny the motion for an inspection of the Grand Jury minutes. United States v. Garsson, S. D. N. Y., 291 Fed. 646; United States v. Violon, S. D. N. Y., 173 Fed. 501; cf. United States v. General Motors, 15 F. R. D. 486, which collects the cases on page 487, nn. 2, 2a.

There is no merit in any of the other contentions of appellant and we find it unnecessary to discuss them.

Judgment affirmed.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	3
Argument	13
Conclusion	25

CITATIONS

Cases:

Andrews v. *United States*, 157 F. 2d 723, certiorari denied, 330 U. S. 821 — 22

Beard v. *United States*, 222 F. 2d 84, certiorari denied, 350 U. S. 846 — 16, 23

Blumberg v. *United States*, 222 F. 2d 496 — 20

Bostwick v. *United States*, 218 F. 2d 790 — 19

Buttermore v. *United States*, 180 F. 2d 853 — 16

Capone v. *United States*, 51 F. 2d 609, certiorari denied, 284 U. S. 669 — 16

Chadick v. *United States*, 77 F. 2d 961 — 16

Dupree v. *United States*, 218 F. 2d 781 — 22

Ford v. *United States*, 210 F. 2d 313 — 24

Ford v. *United States*, No. 794, this term — 20

Gleckman v. *United States*, 80 F. 2d 394, certiorari denied, 297 U. S. 709 — 15

Graves v. *United States*, 191 F. 2d 579 — 16, 17

Guzik v. *United States*, 54 F. 2d 618, certiorari denied, 285 U. S. 545 — 16

Holbrook v. *United States*, 216 F. 2d 238, certiorari denied, 349 U. S. 915 — 16

Holland v. *United States*, 348 U. S. 121 — 19, 20, 21

Jelaza v. *United States*, 179 F. 2d 202 — 16

Kirsch v. *United States*, 174 F. 2d 595 — 16

Malone v. *United States*, 94 F. 2d 281, certiorari denied, 304 U. S. 562 — 16, 17–18, 23

Cases—Continued

	Page
Myres v. *United States*, 174 F. 2d 329, certiorari denied, 338 U. S. 849	23
Olinger v. *Commissioner*, 234 F. 2d 823	22
Oliver v. *United States*, 54 F. 2d 48, certiorari denied, 285 U. S. 543	16
Olson v. *United States*, 191 F. 2d 985	23
Orzechowski v. *United States*, 37 F. 2d 713	16
Paschen v. *United States*, 70 F. 2d 491	16
Singer v. *United States*, 58 F. 2d 74	16
Stinnett v. *United States*, 173 F. 2d 129, certiorari denied, 337 U. S. 957	16
United States v. *Brennan*, 214 F. 2d 268, certiorari denied 348 U. S. 830	25
United States v. *Johnson*, 319 U. S. 503	19
United States v. *Miro*, 60 F. 2d 58	16
United States v. *Venuto*, 182 F. 2d 519	15
United States v. *Werner*, 160 F. 2d 438	22
United States v. *Zimmerman*, 108 F. 2d 370	16
Warring v. *United States*, 222 F. 2d 906, certiorari denied, 350 U. S. 861	22
Wilson v. *United States*, 162 U. S. 613	22

Statutes:

18 U. S. C., Sec. 3486	3
Internal Revenue Code of 1939, Sec. 145 (b) (26 U. S. C. 1952 ed., Sec. 145 (b))	2

Miscellaneous:

H. Res. 78, 82d Cong., 1st Sess	5
Hearings before a Subcommittee of the House Ways and Means Committee, 82d Cong., 2d Sess., Internal Revenue Investigation, Part 4, pp. 3533–3560, 3733–3779	6
2 Wigmore, *Evidence*, Sec. 278 (3d ed. 1940)	22
8 Wigmore, *Evidence*, Sec. 2232 (3d ed. 1940)	24

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 551

JOSEPH D. NUNAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 42–74) is reported at 236 F. 2d 576.

JURISDICTION

The judgment of the Court of Appeals was entered on September 6, 1956. (Pet. App. 42.) By order of Mr. Justice Harlan, dated October 4, 1956, the time in which to petition for certiorari was extended to November 5, 1956. (Pet. 2.) The petition was filed on November 5, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the evidence as to deposits made in bank accounts under petitioner's control should have been stricken from the record.

3. Whether the evidence as to cash expenditures should have been stricken from the record.

4. Whether the jury was properly instructed as to the theory of the defense.

5. Whether the trial court erred: (*a*) in admitting evidence as to petitioner's refusal to submit a net worth statement during the investigation; (*b*) in admitting evidence as to his wife's extravagance; and (*c*) in admitting evidence stemming in part from material which petitioner furnished two Treasury agents who during the course of their investigation were instructed to cooperate with a congressional committee investigating the administration of the revenue laws.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or

imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

18 U. S. C. 3486:

TESTIMONY BEFORE CONGRESS; IMMUNITY

No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.

STATEMENT

On December 2, 1952, an indictment in five counts was returned against petitioner in the United States District Court for the Eastern District of New York charging him with wilful attempted evasion of income tax for each of the years 1946 to 1950, inclusive, in violation of Section 145 (b) of the Internal Revenue Code of 1939. Petitioner's reported and correct net income and tax liability as alleged in the indictment are as follows (R. 1019–1022):

Year	Reported		Correct	
	Income	Tax	Income	Tax
1946	$80,124	$30,555	$102,614	$43,634
1947	78,590	44,315	98,088	59,899
1948	78,612	32,402	102,211	47,043
1949	80,321	37,063	104,140	48,311
1950	112,495	55,060	136,336	72,634

After a jury trial, petitioner was found guilty as charged. (R. 1010–1011.) On August 3, 1954, he was sentenced to imprisonment for five years on each count, the sentences to run concurrently, and fined $3,000 or a total of $15,000. (R. 1015–1017.)

The evidence to support the verdict may be summarized as follows:

Petitioner served as Commissioner of Internal Revenue from March 1, 1944, to June 30, 1947. He had been Collector of Internal Revenue in Brooklyn for the three years immediately preceding his appointment as Commissioner. (R. 1037.) Subsequent to his graduation from law school in 1922, petitioner had been associated with a New York law firm but was not admitted to partnership until May 1945. (R. 23–25, 367.) Upon his resignation as Commissioner, he became a partner in a second law firm located in Washington, D. C. (R. 272.) Thereafter, the business of both firms was largely tax practice. (R. 652.)

Petitioner's wife, whom he married in 1923, is also a law school graduate. (R. 859.) Prior to 1928, she had received substantially in excess of $100,000 from the estates of her father and her uncle. (R. 380–388, 574–575, 786–794.) She was, however, by her own admission and as amply demonstrated by the record, a person of extravagant tastes who had been excessively pampered from childhood. (R. 828–832, 869–871.)

Although petitioner had income from numerous sources, he did not keep any personal books; but, even during the period when he was Commissioner of Internal Revenue, he prepared his own income tax

returns. (R. 347–348, 569, 635.) The amounts of professional income reported from the two law firms were based upon statements given to him by the firms' bookkeepers. (R. 635.) The amounts of dividends and other income to be reported were figured out by petitioner on a "rough piece of paper" which was not retained. (R. 635.) Deductions, which included alleged annual contributions to "various churches and charities" ranging from $5,100 to $11,360, were, by his own admission, largely estimated in round figures. (R. 570, 1113–1126.) Petitioner did not retain any records for any appreciable length of time. (R. 347–348, 635.)

In February 1951, the House of Representatives set up a subcommittee, popularly known as the King Committee, to investigate the administration of the Internal Revenue Code,[1] and petitioner appeared as a witness before it during the following September. (R. 1038.) In October, and again in December, petitioner was interviewed by two revenue agents who had been assigned to investigate his returns for the period 1944–1950. (R. 343–351.) Since petitioner had no available personal records, the agents began an examination of the books of his two law firms and petitioner ultimately supplied them with copies of records which he had obtained from banks and brokers. (R. 347–349, 357.) In questioning petitioner about various entries in these books and records, the agents indicated that they were interested in any inheritances which might have been available to him. (R. 352, 355–356.) After they had con-

[1] H. Res. 78, 82nd Cong., 1st Sess. See R. 1037–1038.

fronted him with several relatively small items of income which had been omitted from the returns, the agents asked for a net worth statement. Petitioner asked time to consult with his attorney, and then refused to submit such a statement. (R. 352–355.) Shortly thereafter, the agents ran across an exceptionally large cash deposit in a brokerage account, but a request addressed to petitioner's attorney for an explanation of the source of this item was fruitless. (R. 358–360.) Ultimately the investigation disclosed unexplained bank deposits and expenditures, together with specific items of unreported income, aggregating $160,000 (R. 573–574), and on April 23, 1952, the agents so testified at a public hearing before the King Committee in the presence of petitioner's counsel.[2] (R. 673.) On May 5, petitioner appeared before the Committee and offered no explanation.[3] (R. 1057–1061.) Up to this point, petitioner had not mentioned his wife's inheritances. (R. 355–356, 598–599.)

During the following July, August, September, and October, petitioner gave several recorded statements under oath to the United States Attorney and then testified at length before the grand jury. (R. 307, 569.) He admitted that he had made a great many cash deposits and cash expenditures, which could not be accounted for out of the amounts of income reported on his income tax returns, during the years

[2] Hearings before a Subcommittee of the House Ways and Means Committee, 82nd Cong., 2d Sess., Internal Revenue Investigation, Part 4, pp. 3533–3560.

[3] The Committee report states that he refused to answer any questions relative to his financial affairs on the ground that his answer might tend to incriminate him. *Id.*, pp. 3783–3779.

involved in this indictment. (R. 573–574.) He claimed that these deposits and expenditures were made from a cash hoard of about $125,000, which he had retained from 1933 to 1945, at first in a metal box at home, and then in a safe deposit box in the Chemical Safe Deposit Company. (R. 468–469, 574–575, 886–889.) He explained that his wife had inherited approximately $158,000 from her father and her uncle during the 1920's,[4] and that he had himself saved about $14,000 prior to 1933 (R. 579–595); that he kept substantially all this money on deposit in the Irving Trust Company and that there was still over $125,000 left in the account at the time of the bank holiday in 1933 (R. 331, 334, 579, 633–634); that, doubtful of the security of the bank account, he gradually withdrew most of it in cash during the years 1933, 1934, and 1935,[5] and kept it in a metal box in the closet of his bedroom, retaining several thousand in the account and several thousand more in his office safe (R. 334, 571–572, 584, 647); that beginning on July 1, 1935, he retransferred about $125,000 of this cash to a safe deposit box in the Chemical Safe Deposit Company (R. 583, 889); and that, when his expenses began to mount after his appointment as Commissioner of Internal Revenue in 1944, he gradually withdrew the cash from the box and either deposited it in a bank

[4] The record discloses that Mrs. Nunan received some $90,000 from her uncle's estate prior to 1928 (R. 786–794), but there was substantial evidence questioning the amount petitioner claimed she received from her father's estate. (See, *e. g.*, R. 391–395.)

[5] All of the bank's records prior to 1937 had been destroyed. (R. 286.)

418766—57——2

account or used it for general expenditures. (R. 575–576.) He insisted that all of the cash deposits and expenditures, for which the agents had been able to find no explanation, came from this one source. (R. 468–469, 575.)

There was evidence to negative the existence of the alleged cash hoard in the metal box during the years 1933 to 1935. Although petitioner professed to have been impelled by lack of confidence in the security of the Irving Trust Company after the bank holiday (R. 334, 648–649), he admitted that he had withdrawn the cash piecemeal, a few thousand at a time, during a period extending from March 1933 until sometime in 1935 (R. 647). The small closet where the metal box was kept had only an ordinary door lock (R. 866–867); it was regularly cleaned once a week by domestics (R. 555–556); and petitioner had no insurance which would have covered theft of the box (R. 572–573). Henry Meyer, the houseman who cleaned the closet each week for several years, testified that he had never seen such a metal box there.* (R. 556–557.) Petitioner, on the other hand, had stated that he retained several thousand dollars at home even after the bulk of the cash had been removed to the safe deposit box in 1935 (R. 470), and Mrs. Nunan, testifying after the jury had heard Meyer, stated that the box remained in the closet for many years. (R. 854, 866.) Only in response to a leading question by defense counsel did she finally recall that it had been moved to an attic storeroom. (R. 855.) Petitioner had also stated to

*Petitioner gave the measurements as twelve by twenty-four by eight inches. (R. 571–572.)

the United States Attorney that he kept as much as $10,000 in his office safe. (R. 332.) The record shows that this safe was always open during business hours and was accessible to eleven or twelve employees. (R. 494–502.)

Furthermore, there was evidence of conduct on the part of petitioner and his wife between 1930 and 1945 which was inconsistent with the claim of a cash hoard in excess of $125,000. In 1933 the National City Bank asked for payment of a $70,000 loan to the New York Contracting Company, secured by a warehouse, on which Mrs. Nunan and her sister were jointly liable together with the Gaffney estate. Petitioner asked for an extension of the loan, and, when the bank declined, petitioner discussed sale of the warehouse although this could only have been done at a financial sacrifice to the owners. Finally, the bank offered to extend the loan provided small quarterly payments were made on principal. Although Mrs. Nunan's share would have been only $625 quarterly, petitioner stated that "it would be impossible" for them to make such payments. (R. 522–528, 531–534.) From 1934 to 1943, Mrs. Nunan's bank account was repeatedly overdrawn, sometimes as often as ten or twelve times within the space of one month. (R. 437–442.) Mrs. Nunan borrowed from her sister (R. 455) and also from the following:

October 1, 1930	John McCarthy	$5,000 (R. 481–482)
January 10, 1936	Judge McNally	$1,000 (R. 552)
May 26, 1939	Bayside Nat. Bank	$500 (R. 434).
August 1, 1939	Bayside Nat. Bank	$850 (R. 434–435)
November 28, 1939	Bayside Nat. Bank	$750 (R. 435–436)
April 17, 1940	Dr. Healy	$2,000 (R. 491–493)
December 20, 1940	E. J. Churchill	$2,000 (R. 486–487)

In 1945 petitioner purchased a piece of jewelry for his wife for $465 and paid for it by installments. (R. 563.) In 1930 petitioner borrowed $10,000 from his mother and gave her a mortgage on his home. (R. 424, 430, 643–644.) In 1931 Mrs. Nunan borrowed $3,000 from Frank Flory and gave him a second mortgage on the home. This was satisfied in 1934, but in the following March, Mrs. Nunan again borrowed $2,500 from Flory and tried to increase this to $3,000 in 1937. Mrs. Nunan became very delinquent in her payments, and in 1943, after Flory's death, his 83-year-old widow complained to petitioner. Petitioner promised to pay the principal if Mrs. Flory would agree to a 10% discount, to which Mrs. Flory readily agreed. Petitioner, however, made no payment on principal until after he had sold the house in 1945. (R. 425–429, 516–522.)

The prosecution presented evidence to show that petitioner had likely sources of unreported income in that he had failed to include in his returns for the years in question specific items of taxable income aggregating some $23,000.[1] The largest items in this group were legal fees. (See, *e. g.*, R. 311–314, 644–646, 818–825.) Other sizable items were dividends, interest, and a gambling gain. (R. 91–96, 281, 755.) In addition, apart from the $23,000 items, it was shown that in 1944, about the time of his appointment as Commissioner of Internal Revenue, petitioner brought to the firm of Glass & Lynch a client who had been charged by the Department of Justice with vio-

[1] The major items comprised in this sum are summarized in the opinion of the Court of Appeals. (Pet. App. 50–55.)

lation of the Food and Drug Act. Petitioner received referral fees of about $11,500 on this case during 1944 and 1945. He did not properly share these fees with his own firm, nor did he report them in his income tax returns since he included only those fees which were supplied to him by the firm bookkeeper. (R. 23–29, 45, 292–294, 297–299, 635.)

There were three stages in the prosecution's proof of the amount of unreported taxable income for the indictment years.

(1) *Bank deposits.*—The prosecution analyzed the periodic deposits petitioner made in his own bank account during the indictment years, as well as the deposits to Mrs. Nunan's accounts, all of which petitioner admitted (R. 593–595) had come from him. All non-income items such as loans, inheritances, return of capital, and transfers between banks were eliminated;[8] also eliminated were a number of deposits by check (R. 736–738) totaling a substantial amount which the agents could not trace to a source or otherwise identify. The remaining totals for each year were treated as taxable income deposited in the banks.

(2) *Specific items of income.*—The prosecution added to these totals all ascertainable income items

[8] In its computation, the prosecution treated petitioner's *distributive share* from the two law partnerships as taxable income, and his *deposited* drawings as non-taxable. The drawings were, therefore, eliminated in determining the total of taxable bank deposits. (See, *e. g.*, R. 1145–1146.) Substantially the same end result would have been accomplished by treating all deposited drawings as taxable income, and by adding in the remainder of the distributive share as undeposited income, although this would have to some extent altered the allocation of income over the years involved.

which had *not* been deposited in the bank accounts, such as dividends credited to brokerage accounts, salary checks which were cashed, and fees received in stock. Also included in this category was petitioner's distributive share of partnership income (as distinguished from actual drawings).[9]

(3) *Expenditures.*—The prosecution then added certain known cash expenditures which could not be accounted for from an analysis of the bank accounts and which petitioner asserted had come from the accumulation in his safe deposit box. (R. 538–544, 599–601, 1128–1144.)

The Government's computation showed the following amounts of unreported income:

1946	$41,603.64	(R. 604–607, 1145)
1947	$19,503.69	(R. 615–616, 1147–1148)
1948	$22,251.14	(R. 617–618, 1150–1151)
1949	$16,152.91	(R. 618–619, 1155)
1950	$21,240.76	(R. 620–621, 1159)

Petitioner did not take the stand at the trial.[10] In arguing the case to the jury, defense counsel referred at the outset to the numerous prominent men who had testified as to petitioner's reputation for truthfulness and insisted, "that is what is involved in this case, truthfulness, truthfulness, truthfulness". (R. 899.) In discussing the specific items (*supra*), which were admittedly not reported, counsel argued that some did not constitute taxable income and that most of them had been omitted through negligence. (R. 901–918.)

[9] See note 8, *supra.*

[10] Long passages from his statement to the United States Attorney and from his testimony before the grand jury were read into the record by both the prosecution and the defense. R. 309–314, 326–339, 467–475, 569–597, 623–651, 806–810.)

And, in discussing the disputed bank deposits and expenditures, counsel repeatedly urged upon the jury his position that the prosecution had not disproved petitioner's story that all this money came from the cash hoard so long retained in the metal box and the safe deposit box. (R. 920, 923, 928, 930, 932, 942, 945, 946.)

ARGUMENT

1. The proof of petitioner's unreported income in this case was both direct and circumstantial. The Government based its computation upon the method of circumstantial proof known as the "bank deposits" theory. All the deposits which went into the bank accounts of petitioner and his wife were analyzed to determine how much represented current taxable income. (R. 1128–1161.) To this was added all traceable specific items of current taxable income which had *not* been deposited in the bank accounts.[11] And to this total were added certain cash expenditures which could not be accounted for out of either the deposited or the non-deposited current income. The sum total of unreported income determined by this computation was about $125,000 for the five-year indictment period. (R. 599–601, 1145–1159.)

The specific items of current taxable income, including those which had been deposited in the bank accounts (*supra*), totaled approximately $23,000 in unreported legal fees, dividends, interest, etc. These

[11] The particular treatment of deposited and undeposited income from the two law partnerships has been noted above. See note 8, *supra*.

specific items were of course proven by direct evidence. Petitioner's explanation to the jury was that the $23,000 had been omitted from his returns unintentionally (R. 898–918) and that the remainder of the $125,000 came from the cash hoard which he had kept in the metal box and the safe deposit box from 1933 to 1945 (R. 898–899, 918–946).

As the court below pointed out (Pet. App. 49–56), the direct evidence of $23,000 unreported income would alone have been sufficient to support the verdict. At the trial, the defense recognized the independent nature of the direct evidence, for in the motion for acquittal it was contended that the $23,000 was not a substantial omission and that there was insufficient evidence to establish any wilful failure to report (R. 817); and in the closing address to the jury it was argued, as we have just noted (*supra,* p. 12), that the omissions were unintentional. It is not clear either from the statement of the questions in the petition for certiorari (pp. 2–9) or from the argument (pp. 29–39) whether petitioner now contends that there was no substantial evidence to support the verdict, although a considerable portion of the petition's statement of the case (pp. 10–20) is devoted to an attack upon the $23,000 which was admittedly unreported. Suffice it to say that the statements of fact in the petition itself are enough to indicate that there was evidence from which the jury could reasonably have concluded that the $23,000 in specific items of income had been intentionally omitted from the returns for the years involved.

2. The essence of petitioner's major complaint in this Court appears to be that the circumstantial portions of the Government's computation, *i. e.*, the analysis of the bank deposits and the cash expenditures, were insufficient, and that his motion to strike them from the jury's consideration (R. 816, 817) should have been granted (Pet. 31–32). This contention, which assimilates and confuses two separate and distinct theories of circumstantial proof, is without merit. We shall treat first that portion of the Government's proof concerning the bank deposits.

The courts of appeals have long recognized that the existence of current income may be inferred when the Government shows that the taxpayer was engaged in an income producing business and that he made periodic deposits in bank accounts under his control, and where the revenue agents have thoroughly analyzed these deposits and have made a reasonable effort to exclude all non-income items such as redeposits, transfers between accounts, loans, gifts, or deposits from a prior accumulation. As was said in *Gleckman* v. *United States,* 80 F. 2d 394, 399–400 (C. A. 8th), certiorari denied, 297 U. S. 709: "* * * if it be shown that a man has a business or calling of a lucrative nature and is constantly, day by day and month by month, receiving moneys and depositing them to his account and checking against them for his own uses, there is most potent testimony that he has income, and, if the amount exceeds exemptions and deductions, that the income is taxable. * * *" See also *United States* v. *Venuto,* 182 F. 2d 519, 521

(C. A. 3d); *Beard* v. *United States,* 222 F. 2d 84 (C. A. 4th), certiorari denied, 350 U. S. 846; *Stinnett* v. *United States,* 173 F. 2d 129 (C. A. 4th), certiorari denied, 337 U. S. 957; *Holbrook* v. *United States,* 216 F. 2d 238 (C. A. 5th), certiorari denied, 349 U. S. 915; *Kirsch* v. *United States,* 174 F. 2d 595, 601 (C. A. 8th); *Graves* v. *United States,* 191 F. 2d 579 (C. A. 10th).[12] The nature of a taxpayer's business and the periodicity of his deposits support the inference that the deposits represent current income and not funds dribbled into the accounts from some prior cash accumulation. *Malone* v. *United States,* 94 F. 2d 281, 286, 287–288 (C. A. 7th), certiorari denied, 304 U. S. 562.

In this case, there is no doubt that petitioner enjoyed an extremely lucrative law practice, and the periodicity of his deposits is unchallenged.[13] The revenue agents exhaustively analyzed all the deposits

[12] The bank deposits method of proof has often been used by the Government in conjunction with other methods. See *United States* v. *Miro,* 60 F. 2d 58, 59 (C. A. 2d); *Orzechowski* v. *United States,* 37 F. 2d 713, 714 (C. A. 3d); *Singer* v. *United States,* 58 F. 2d 74 (C. A. 3d); *Jelaza* v. *United States,* 179 F. 2d 202 (C. A. 4th); *Chadick* v. *United States,* 77 F. 2d 961 (C. A. 5th); *Buttermore* v. *United States,* 180 F. 2d 853 (C. A. 6th); *Oliver* v. *United States,* 54 F. 2d 48, 50 (C. A. 7th), certiorari denied, 285 U. S. 543; *Guzik* v. *United States,* 54 F. 2d 618, 620 (C. A. 7th), certiorari denied, 285 U. S. 545; *Capone* v. *United States,* 51 F. 2d 609, 619 (C. A. 7th), certiorari denied, 284 U. S. 669; *Malone* v. *United States,* 94 F. 2d 281 (C. A. 7th), certiorari denied, 304 U. S. 562; *Paschen* v. *United States,* 70 F. 2d 491 (C. A. 7th); *United States* v. *Zimmerman,* 108 F. 2d 370 (C. A. 7th).

[13] The periodicity of deposits is, of course, a relative matter which depends on the nature of the taxpayer's business. An attorney could not be expected to make deposits with the same regularity as a merchant.

(R. 1128–1144), carefully eliminated all non-income items (R. 350, 538–548, 598–601, 654, 734–738, 1146, 1148–1149, 1151–1153, 1156–1157, 1160–1161), and repeatedly sought explanations from petitioner and his attorney, without success, for numerous checks and currency deposits which they could not identify (R. 347–364, 538). Not until the investigation had been in progress for over nine months, and not until some considerable time after the agents had openly testified that their findings indicated $160,000 unreported income, did petitioner come forward with his story of a cash hoard held in the metal box and the safe deposit box between 1933 and 1945 (*supra*, pp. 6–8). The revenue agents then set to work to develop the evidence, summarized above (*supra*, pp. 8–10), from which the jury could reasonably have concluded that petitioner had no such cash accumulation prior to the indictment years and that his story was a fabrication. In an excess of caution, the prosecution did not claim the unidentified checks, for which petitioner never offered an explanation, as income (R. 654, 734–738, 1146, 1149, 1152, 1156, 1160), although this would have been proper under the bank deposits theory. Petitioner's explanation of the cash deposits was, however, not accepted and they were charged as income. Nor, the verdict indicates, was petitioner's explanation accepted by the jury.[14]

[14] This case is quite similar to *Graves* v. *United States*, *supra*, in which the taxpayer at first concealed a number of his bank accounts from the examining agents, and then, after they had been discovered, attempted to ascribe the deposits to a prior accumulation. It bears an even more striking resemblance to *Malone* v. *United States*, *supra*, in which the taxpayer, a prom-

Petitioner complains (Pet. 30–33) that the Government did not establish a source of the cash deposits or a starting point for its computation. As to source, however, all the bank deposits method requires in this regard is that the taxpayer be shown to have an income-producing business. Furthermore, there was evidence, as the court below noted (Pet. App. 50–54) and as we have pointed out (*supra*, pp. 10–11), to indicate that petitioner had received fees which were never recorded on the books of either of his two law firms. As to the starting point, this is not a requirement of the bank deposits type of proof, but rather of the net worth method. The latter relies upon inferences reasonably to be drawn from annual increases in net worth; whereas the former depends upon an examination of daily, weekly, or monthly deposits, and the function of the starting point is fulfilled by the thoroughness of the prosecution's analysis of the individual deposits. The court of appeals decisions

---

inent political figure in Illinois, offered a similar belated explanation. The Court of Appeals said (94 F. 2d at 288):

"When the defendant was interviewed by internal revenue agents in 1930, he surely knew the purpose of the investigation was to ascertain if there had been an evasion of income tax. Instead of explaining the source of the currency deposits, he displayed an ignorance concerning the same which cannot be attributed to one of his experience and intelligence. Neither is it consistent with innocence. * * * It is more reasonable to conclude that the explanation now offered was not in existence at that time. Thus, his refusal to explain, when given an opportunity, is another circumstance pointing toward guilt. * * * When, however, he * * * sought to explain, the jury was not bound to accept his story as true. Their verdict discloses they disbelieve him, and in this, we think, they were entirely justified. * * *"

which petitioner asserts (Pet. 30–32) to be in conflict with the present decision are all net worth cases and are not here in point.[15] The Government in this case, it must be re-emphasized, did not base any part of its proof on a theory of increments to petitioner's net worth, but instead relied on evidence of periodic bank deposits, specific income items, and certain expenditures (see *supra,* pp. 11–12).

3. The expenditures portion of the Government's proof of unreported income rests, of course, upon a somewhat different basis than the evidence of either the bank deposits or the specific items. Compare *United States* v. *Johnson,* 319 U. S. 503, 517, with *Holland* v. *United States,* 348 U. S. 121. It should be noted at the outset, however, that expenditures played a relatively minor role in the Government's computation in this case. The annual amounts proven by this method were:

1946	$28, 953. 00 (R. 1145)
1947	$3, 603. 11 (R. 1148)
1948	$3, 750. 00 (R. 1151)
1949	$0. 00 (R. 1155)
1950	$9, 661. 75 (R. 1159)

A comparison of these amounts with the total proven unreported income for each of the years involved (*supra,* p. 12) reveals that the Government's reliance on expenditures proof was either negligible or totally lacking for 1947, 1948, and 1949. Since the jury was repeatedly instructed that it must treat each

[15] Both bank deposits and net worth computations were used in *Bostwick* v. *United States,* 218 F. 2d 790, 794 (C. A. 5th). But the point raised by petitioner was not in issue since the prosecution seems to have assumed that a starting point was required for both.

count as a separate offense (R. 999, 1001, 1008), petitioner can scarcely have been prejudiced on these three counts, even if the expenditures evidence should have been stricken. We submit, however, that it was properly received.[16]

The only defense objection at the trial which has pertinence here was that the Government had failed to establish a likely source from which petitioner's cash expenditures had come, and that it had failed to disprove his metal box and safe deposit story. (R. 816, 817.) There was no merit in this objection. Petitioner's lucrative practice, and the evidence of fees which were never recorded on the partnership books (*supra,* pp. 10–11), provided evidence of a source here, just as the hotel business did in the *Holland* case, 348 U. S. at 137.[17] And there was ample evidence upon which the jury could reasonably have concluded that petitioner's claim of a huge cash hoard was a fabrication (*supra,* pp. 8–10).

Petitioner did not raise the starting-point issue at any point in the trial court (R. 816, 817, 1104). Assuming *arguendo* that the issue is open here, it requires but short comment. The primary purpose for

[16] Petitioner's reliance upon *Blumberg* v. *United States*, 222 F. 2d 496 (C. A. 5th), is misplaced. There the court held it was prejudicial error to admit evidence of cash expenditures not material to the Government's theory of proof which was that the defendant had omitted specific items of income from his returns. Here, the expenditures are part of the Government's proof of unreported income.

[17] Compare No. 794, this Term, *Ford* v. *United States*, where the taxpayer's principal reported income came from a fixed salary.

the starting-point requirement in a net worth case is to provide an opening net worth from which to calculate future increases in the taxpayer's assets. *Holland* v. *United States,* 348 U. S. 121, 132. True, an opening net worth, if established, also serves to negate the possibility that the alleged net worth increase came from pre-existing assets. *Id.* at 135–138. But in this case, unlike a net worth case, it is not an indispensable requirement that the prosecution discharge its burden of negating pre-existing assets by affirmatively establishing an opening net worth. Here, petitioner was made fully aware that the revenue agents were seeking an explanation of $160,000, largely composed of cash deposits and cash expenditures. He gave what purported to be a complete explanation of these deposits and expenditures, thus admitting that the only prior acquired asset which was pertinent to the inquiry was the cash in the metal box.[18] When the prosecution demolished that story, by proof of its inherent incredibility and by proof of petitioner's need for cash in the 1933–1945 period (*supra,* pp. 8–10), it also answered the present contention (Pet. 32) that the Government failed to prove lack of funds at the

[18] The critical issue before the jury was the existence or nonexistence of the claimed cash hoard. Thus, had the Government offered a statement of petitioner's net worth, the statement would obviously not have credited petitioner with the disputed cash and under the circumstances would have had little probative value.

starting point.[19] The Government's proof carried with it the very negation which petitioner now demands.[20]

4. Petitioner's contention (Pet. 34-36) that the jury was not adequately instructed as to the claims of the defense is without merit. The jury was instructed in plain and simple language that, if (as petitioner contended) the bank deposits and expenditures came from cash on hand at the beginning of the period covered by the indictment, they could not constitute unreported income. The jury was charged, in part, as follows (R. 1005–1007):

> The bare fact that there were bank deposits or other currency deposits or expenditures do not [sic] in and of themselves [sic] mean that an income tax has been wilfully evaded as to those sums.
>
> * * * * *

---

[19] Furthermore, the falsity of petitioner's explanation was, in itself, evidence that he was conscious of the taxable nature of the funds in question. *Wilson* v. *United States*, 162 U. S. 613, 620–621; *Andrews* v. *United States*, 157 F. 2d 723, 724 (C. A. 5th), certiorari denied, 330 U. S. 821; *United States* v. *Werner*, 160 F. 2d 438, 441 (C. A. 2d); 2 Wigmore, *Evidence* (3d ed.), Sec. 278.

[20] The Court of Appeals decisions upon which petitioner relies (Pet. 30–32) are readily distinguishable upon their facts. Here, unlike the situation in *Dupree* v. *United States*, 218 F. 2d 781 (C. A. 5th), and *Olinger* v. *Commissioner*, 234 F. 2d 823 (C. A. 5th), the Government presented a large body of evidence (*supra* pp. 8–10) to refute the existence on the crucial date of the alleged cash hoard. In *Warring* v. *United States*, 222 F. 2d 906 (C. A. 4th), certiorari denied, 350 U. S. 861, the Government employed the net worth method of proof and offered evidence of cash expenditures to corroborate defendant's extrajudicial admissions as to the starting point net worth.

> * * * It is for you to determine whether or not upon all of the evidence the defendant had unreported income, the tax whereon was or was not wilfully evaded, or whether or not the money was received by the defendant prior to 1946 and therefore is not income.
>
> * * * * *
>
> In short, the defendant need not prove to you that expenditures were made from prior accumulations and a source other than taxable income for the years specified in the indictment.

Petitioner requested no instruction on the bank deposits and expenditures evidence other than the one quoted in the petition (p. 35), which was in effect covered by the actual charge given, and the only objection was that the trial court had failed to adopt the language requested. (R. 1009.)

5. (a) Also without substance is petitioner's contention (Pet. 36–37) that the court erred in admitting testimony that he refused to submit a net worth statement to the agents during the investigation. Since petitioner did not object to this testimony at the trial (R. 353, 355, 363), he cannot now be heard to complain of its admission. In any event, the testimony was clearly admissible in explanation of the Government's use of the bank deposits analysis. See *Beard* v. *United States, supra; Malone* v. *United States, supra; Myres* v. *United States,* 174 F. 2d 329, 337 (C. A. 8th), certiorari denied, 338 U. S. 849; *Olson* v. *United States,* 191 F. 2d 985, 988–989 (C. A. 8th). No instruction on this issue was either requested or given.

(b) Nor is there any merit to petitioner's conten-

tion (Pet. 36, 38) that it was error for the trial court to admit evidence of conduct on the part of his wife which was inconsistent with his possession of a large accumulation of cash. It was petitioner, not the Government, who put in issue the financial affairs and conduct of his wife by his claim that the alleged cash hoard consisted for the most part of inheritances received by her many years prior to the indictment period, and by his admission (R. 326–327, 593–595) that his wife had no income of her own and that all her deposits and expenditures were made with funds which he gave her. And it was petitioner, not the Government, who called his wife as witness. The Government's evidence relating to her conduct was confined to third party testimony and records. No private communications during coverture are involved here. Moreover, joint returns were filed by petitioner and his wife for three of the years covered by the indictment. (R. 1118–1126.) Under these circumstances, evidence relating to the conduct of petitioner's wife was clearly competent, material, and relevant. See *Ford* v. *United States,* 210 F. 2d 313, 317 (C. A. 5th); 8 Wigmore, *Evidence* (3d ed. 1940), Sec. 2232.

(c) Finally, petitioner contends (Pet. 38–39) that evidence was submitted by the Government in violation of 18 U. S. C. 3486 (*supra,* p. 3), which prohibits use against a defendant in a criminal proceeding of *testimony* given by him before a Committee of Congress. He argues that the statutory prohibition extends to evidence furnished to agents of a Committee and to clues and leads deriving from such evi-

dence, and that here much of the evidence adduced by the Government stemmed from material which he furnished the investigating revenue agents as agents of the King Committee. The short answer to this contention is twofold. In the first place, the investigating agents were not, as petitioner asserts (Pet. 39), "under the [King] Committee's aegis". Although the revenue agents were instructed to cooperate with the Committee after the investigation had been under way for some time (R. 672–676), they were not employees or agents of the Committee.[21] Secondly, even if the revenue agents were to be regarded as agents of the Committee, it would not aid petitioner since the statute applies only to *testimony* given before "an organic part of the Committee, which can be composed only of members of Congress". *United States* v. *Brennan*, 214 F. 2d 268, 270 (C. A. D. C.), certiorari denied, 348 U. S. 830.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH M. HOWARD,
JOHN J. MCGARVEY,
Attorneys.

MARCH 1957.

[21] In fact, at one point in the investigation the agents' records and work papers were subpoenaed by the Committee and taken to Washington; the papers were not returned to the agents until three of four weeks later. (R. 364.)

U. S. GOVERNMENT PRINTING OFFICE: 1957

MAR 2 1 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 551

JOSEPH D. NUNAN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF

RICHARD J. BURKE and
J. BERTRAM WEGMAN,
Counsel for Petitioner,
60 Wall Street,
New York 5, New York.

TABLE OF CONTENTS

PAGE

I—What does the Opposition Brief ignore? 2

II—What are the distortions in the discussion of the facts in the Opposition Brief? 4

III 8

IV 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 551

JOSEPH D. NUNAN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF

After taking four full months following the filing of the Petition for its preparation, the Brief in Opposition adroitly begs the questions presented by skirting them, flaunting the prejudicial aspects of the case as the very argument for a denial of review.

The legally inadmissible evidence which inevitably served to prejudice the jury against the defendant continues to be relied upon to induce this Court to refuse to give full consideration to the merits of the questions presented, thereby leaving it to appear to lower federal courts that this Court perceived nothing in the aberrations below calling for corrective action. It is not unreasonable to expect that in that event resort more commonly may be had to appeals to prejudice in aid of proof feared inadequately convincing.

Why should a prosecutor take the risk that the jury may not be convinced by meager proper proof if a guilty verdict may with no risk be insured by introducing prejudice, and that prejudice will not invalidate the verdict because, equally prejudiced thereby, the reviewing court may be unwilling to say that the jury would not anyway have considered the proper but equivocal proof sufficient even had it not been influenced by the prejudice to overcome reasonable doubts?

The Brief in Opposition by its distortions of such of the facts as it chooses to discuss as well as by its avoidance of any discussion of other invasions in this case of basic rights of a defendant in a criminal trial in the federal courts has pointed up the importance of review on certiorari in this Court.

I.

What does the Opposition Brief ignore?

It does not mention, let alone attempt to justify:

1. The prejudicial effect of the admission of testimony and exhibits not relevant to or probative of the offense charged, the inflammatory arguments predicated thereon by the prosecutor, and the failure of the trial court to do anything to mitigate that prejudicial effect. In this category are the following examples, with parenthetical reference in each instance to the discussion thereof in the Petition here:

> (a) The Brown & Bigelow fee (Petition, pp. 12-15), in which connection, it may also be noted, no mention at all is made in the Opposition Brief of the refusal to allow petitioner to offer documented proof that he had not in fact undervalued the stock in reporting the income received by him as a legal fee in that form.

(b) The Anheuser-Busch payments (Petition, pp. 15-17).

(c) The Dr. Jones checks for $1500 endorsed over to charities (Petition, pp. 19-20).

(d) The Gaylord Container Co. ruling (Petition, pp. 24-26).

2. The prejudicial effect of the refusal by the trial court to instruct the jury that petitioner had a right to file amended tax returns, as he indeed had, and to pay the additional tax which the Government accepted, thus leaving uncorrected the argument of the prosecutor that the very filing of such amended returns could be considered an admission of a willful attempt to evade tax.

3. That, whereas it is said that there was "direct proof" of the receipt by petitioner of "specific items of current taxable income" which he did not report, such proof was wholly inadequate to support the verdict for the reason that—passing the fact that these "specific items" totaled altogether about $23,000 over the five-year period in which petitioner on his tax returns had reported gross income of $521,343.53—it is impossible to say that the jury was convinced thereby of his guilt, unaffected, uninfluenced and unprejudiced by the proof concerning the cash deposits and expenditures, because of the very nature of these "specific items" as examined in detail in the Petition here, pages 10-20.

4. The prejudicial effect of allowing the prosecutor to argue, and the refusal by the trial court to afford petitioner any protection against such improper argument, that, although the bill of particulars disclaimed any question of petitioner's deductions on his tax returns and although there was not a scintilla of proof that they were not properly computed (see, *e.g.*, R. 570a), the jury could infer an attempt to evade tax because petitioner had not itemized his deductions.

5. In arguing that the prosecution had proved "a likely source" of unreported income reflected by the cash bank deposits and expenditures by showing that petitioner had failed to report the "specific items" mentioned above, there is an utter failure to show any logical relevance. There was simply no evidence whatsoever of any unreported receipts by petitioner in the form of currency. The Court below thought it "likely" that petitioner had withheld "information of fees paid in currency" saying it would not be "strange" if he had been paid in cash for his services. But in a criminal case is it permissible to draw such an inference on such speculation, and is that to be considered as proof beyond a reasonable doubt?

II.

What are the distortions in the discussion of the facts in the Opposition Brief?

1. It is said (Opposition Brief, pp. 5-6) that petitioner (a) had failed to mention his wife's inheritances until the summer of 1952, although the agents had indicated to him in October and again in December 1951 "that they were interested in any inheritances which might have been available to him." The fact is that they were asking him very specifically about inheritances from the estate of petitioner's own father and uncle, in 1946 and later, with which information they were fully supplied. In the context of this interrogation, it is surely a distortion to say that petitioner's conduct was suspicious because he had not volunteered information regarding his wife's inheritances some thirty years or so earlier, which one could hardly suspect to have had any relevancy to the inquiries made of petitioner.

The Opposition Brief at page 6 refers to the agents' testimony before the King Committee in April 1952, im-

plying that petitioner had theretofore offered no explanation of the source of his cash bank deposits and expenditures. This is simply not so. Petitioner had testified before the King Committee in respect thereof on March 18, 1952.*

2. The Opposition Brief suggests "there was substantial evidence questioning the amount" petitioner's wife had inherited. This "substantial evidence" is said to be the testimony of a prosecution witness who, in re-

---

* The following questions and answers are taken from the Official Stenographic Transcript of the Executive Session of the King Committee of March 18, 1952 by the Alderson Reporting Company, Washington, D. C., pages 45, 46, 48, 49 and 88:

"Mr. DeWind: Was this cash [$27,953 spent in 1946 for Gaylord stock] obtained by you out of a safe deposit box?

Mr. Nunan: Yes, sir.

Mr. DeWind: In which bank was the safe deposit box contained?

Mr. Nunan: I think it is in the Chemical Bank, and I am not sure. It used to be the Mutual Life, in the Mutual Life Building on Cedar Street, and then Chemical took it over, and I think the Chemical was at One Broadway and Cedar Street. * * *

Mr. DeWind: How long have you maintained the safe deposit box at that branch of the Chemical Bank?

Mr. Nunan: Either 1934 or 1935, and I don't know. It is either one of those two years. * * *

Mr. DeWind: In March of 1944, when you became Commissioner of Internal Revenue, did you have cash in your safe deposit box?

Mr. Nunan: Yes, sir. * * *

Mr. DeWind: In 1941 did you have cash in your safe deposit box?

Mr. Nunan: Yes, sir. * * *

Mr. DeWind: Can you say: Was it in excess of $10,000?

Mr. Nunan: Yes, sir.

Mr. DeWind: Now, when you purchased the stock from Mr. Gilbert, that he had bought, did you pay him cash for the stock when you bought it from him?

Mr. Nunan: Yes, sir.

Mr. DeWind: What was the source of that cash?

Mr. Nunan: The same answer.

Mr. DeWind: Did you withdraw that cash from your safe deposit box?

Mr. Nunan: Yes, sir."*

spect thereof testified (R. 663a and 697a) that he had no proof whatsoever of the question he raised. Indeed, of the seven items making up the total of $171,500 as to which petitioner gave his recollection as a source of the funds he had on hand, the Revenue Agent verified upwards of $132,000 and made no effort to question an additional $23,500. He did say that petitioner had expended $23,000 of this sum, whereas petitioner's recollection of the expenditure was $20,000. Although the Opposition Brief states that petitioner had claimed to have saved about $14,000 prior to 1933, the record (R. 329a) shows that he said that his savings were $2,500 to which was added $5,000 received from his father.

3. Described as "evidence to negative" petitioner's claim regarding his cash funds, the Opposition Brief (p. 8) refers to the testimony of Henry Meyer that he had never seen the metal box in which it was kept. The record is clear that Meyer did not enter petitioner's employ until the year after the box had been removed, and the effort in the Opposition Brief to suggest otherwise is based upon a distortion of Mrs. Nunan's testimony, implying that she had said that the box remained in the closet for "many years" after 1935, when, in fact, in the context, it is clear that her reference to "many years" related to the period from 1926 on.

4. The Opposition Brief purports to set forth other "facts" inconsistent with petitioner's claim that he had these cash funds in his possession. These are said to be:

> (a) That petitioner had stated that it would be impossible for the petitioner and his wife to pay $625 quarterly on a mortgage indebtedness of a corporation for which Mrs. Nunan and her sister had assumed liability as stockholders. The fact is that, as the record shows, petitioner was not obligated on the mortgage debt and there was no

question of his paying or of his ability to do so, and that his statements were made as attorney for Mrs. Nunan and her sister, Mrs. Healy (there is no evidence as to what Mrs. Healy's financial condition was at the time). Because the New York Mortgage Moratorium Act then in effect, prevented the bank from foreclosing, petitioner acting as attorney for the two sisters refused to permit them to make any payments. It seems surely to be snatching at straws to argue that this incident is evidence of lack of funds.

(b) That Mrs. Nunan's bank account was repeatedly overdrawn, and that she borrowed money from many people. That there is no support for the argument is shown on pages 23-24 of the Petition here, demonstrating that there was no relationship between Mrs. Nunan's shortages and borrowings, and the petitioner's possession of the funds in question. She was at great pains to make sure that petitioner did not learn of them. For example, Mrs. Flory, a Government witness who is 83 years old, testified on her direct examination that petitioner knew nothing about Mrs. Nunan's borrowing. The record references are given in the Petition.

(c) It is said to be evidence of financial need that in 1930 petitioner borrowed $10,000 from his mother, and gave her a mortgage on his home. This completely ignores the explanation in the record (R. 623a and 644a) that this mortgage had no relationship to petitioner's financial position.

The so-called "proof of petitioner's need for cash" is nothing more than proof that Mrs. Nunan needed cash from time to time, which need she sought carefully to conceal from her husband.

5. In answer to petitioner's argument that it was prejudicial error to allow evidence of the conduct of petitioner's wife, the Opposition Brief makes the point that "it was petitioner, not the Government, who called his wife as witness." Surely petitioner was compelled to call his wife as witness only because the trial court had allowed the legally inadmissible Government testimony concerning Mrs. Nunan's borrowings. Nowhere does the Opposition Brief acknowledge that the Government's witnesses proved that Mrs. Nunan's borrowings were unknown to petitioner.

6. It is difficult to understand what purpose can be served other than to create prejudice by the proof offered at the trial and the reference in the Opposition Brief to the receipt by petitioner of referral fees during 1944 and 1945 from the firm of Glass & Lynch. There is no showing that he did not report this income on his tax return, nor is there anything showing that petitioner "did not properly share these fees with his" partners, although he was not then a partner!

III.

The Opposition Brief seems to recognize that the evidence concerning the cash expenditures should, perhaps, have been stricken, but suggests that petitioner was not prejudiced, because as to three of the years only a small amount was involved. The distinction seems to be wholly without any difference, and the evidence offered as to the cash expenditures, like that pertaining to the cash deposits, was nowhere shown to have been derived from any income, nor was there any showing of any source of income in cash. The prejudice is obvious. Nor does there seem to be any substance to the argument in the Opposition Brief that the *Blumberg* case is not apposite; if, as the Opposition Brief argues, the verdict can be sustained on the basis of the so-called "specific items" the case cited is directly in point.

IV.

The Opposition Brief seeks to dispose of three of petitioner's contentions summarily, saying in defense of the prosecution's failure to establish a starting point that petitioner had not raised that question below, that petitioner cannot now be heard to complain of the admission of testimony that he refused to submit a net worth statement because he had not objected to that testimony at the trial, and that the restriction on the use of testimony given before a Congressional Committee is not applicable to this case, because the investigating agents had only been "instructed to cooperate with the Committee after the investigation had been under way for some time."

The record references given in the Opposition Brief (p. 20) to show that the "starting point issue" had not been raised below, show, instead, that petitioner had in every instance raised the issue that evidence of cash bank deposits and expenditures was inadmissible and highly prejudicial in the absence of proof that petitioner was not possessed thereof prior to the indictment period.

The contention that petitioner cannot be heard to complain about the net worth testimony because he did not object to its admission completely distorts the point made by petitioner. It was not the bare testimony of which petitioner complains as a violation of his constitutional rights, but the argument based thereon which was elaborated before the jury and supported by the Court below that the evidence that petitioner had refused to give the net worth statement in and of itself was cogent proof from which the jury could infer tax evasion. That the point was raised below is clearly shown in the opinion of the Court below.

Finally, in respect of the use of evidence obtained through the instrumentality of the Congressional Committee, the Opposition Brief completely ignores and makes no reference whatsoever to the testimony quoted

in the Petition here (pp. 27-29) demonstrating beyond doubt that the agents had been assigned to conduct the investigation on behalf of the Committee at least two days prior to their commencement of that investigation, and that at the time that the agents testified before the Committee concerning the cash bank deposits and expenditures, they averred that they had no evidence that the source thereof was "unreported income • • • upon which any taxes were due".

Respectfully submitted,

RICHARD J. BURKE and
J. BERTRAM WEGMAN,
Counsel for Petitioner,
60 Wall Street,
New York 5, New York.

APR 18 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 551

JOSEPH D. NUNAN, JR.,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

RICHARD J. BURKE and
J. BERTRAM WEGMAN,
Counsel for Petitioner,
60 Wall Street,
New York 5, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 551

JOSEPH D. NUNAN, JR.,
Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph D. Nunan, Jr. hereby petitions for rehearing of this Court's order entered March 25, 1957 denying his petition for a writ of certiorari. The ground of the petition is that intervening circumstances of substantial effect have occurred since he filed his petition for a writ of certiorari on November 5, 1956.

The intervening circumstances consist of the decision by the Court of Appeals for the First Circuit in *Massei* v. *United States,* No. 5132 (not yet officially reported), on February 27, 1957, and the entry of an order by this Court on February 25, 1957 granting the petition for a writ of certiorari in *Ford* v. *United States* (reported below *sub. nom. United States* v. *Ford,* 237 F. 2d 57 [C.A. 2]).

The decision in *Massei* v. *United States* produces a conflict between the Courts of Appeals for the First and Second Circuits as to the proof required to establish a "likely source" of taxable income, where the Government relies upon circumstantial evidence of an apparent increase in defendant's assets during the years covered by the indictment in tax evasion cases, and also as to the necessity of establishing such a "likely source."

This Court has granted review of the position taken by the Second Circuit in *Ford* v. *United States*. Substantially the same question was presented by the decision of that Court of Appeals in your petitioner's case.

In *Massei* v. *United States*, a case predicated upon unexplained annual increases in the defendant's net worth, the conviction was reversed, basically because of the failure of the Government to establish a "likely source" for the alleged additional income. The defendant was a police officer, and the Government claimed—but failed to prove—that the source of the additional income was graft. In a dissenting opinion Woodbury, C. J. said: "It seems to me that proof of position on a municipal police force, where everyone knows opportunities for graft exist, is as much proof of a likely source of unreported income as is proof of ownership of a business capable of producing income." He would have affirmed, he said, on the general line of reasoning followed by the Second Circuit in *United States* v. *Ford*.

In the *Ford* case—also involving a police officer—the Second Circuit appears to have held that it was not necessary to establish a "likely source", while making reference nevertheless to the defendant's "graft opportunities."

In the instant case your petitioner disputed the admissibility of evidence that he had deposited and expended $98,092.86 in currency (claimed by the prosecution to be income) during all of the indictment years, because of the failure of the Government to prove any "likely source" of such currency income. The Government in this Court, while conceding that such proof was required, argued (Brief in Opposition, p. 20) that the fact that petitioner had a lucrative law practice, supplemented by proof that a few fees were not recorded on the partnership books, provided evidence of a source "just as the hotel business did in the *Holland* case, 348 U. S. at 137". But the hotel business in the *Holland* case, as this Court there said, was proven to be capable of producing much more income than was reported, by contrasting its profits in earlier years under other management. In the instant case there was no proof that petitioner's law practice was capable of producing substantial additional income, nor was there proof that fees were ever paid in currency.

Instead, the Government—and the Court below—resorted to several fees paid by checks (which were not cashed) or paid by corporate securities (which were not sold), loosely described as not having been reported on the tax returns or recorded on the partnership books.

The facts are that the Brown & Bigelow stock fee, and the Anheuser-Busch fee which was paid by checks, were the only fees not recorded at all on the partnership books, and these particular fees *were* reported on petitioner's tax returns, according to the Government's revenue agent (R. 761a, 771a); the dispute was only as to the proper valuation of the Brown & Bigelow stock, and in the case of the Anheuser-Busch fee as to the omission of one $500 check (out of $1500) from petitioner's original tax return,

which was included on his amended return. Fees which were reported on petitioner's returns, it is submitted, cannot logically suffice to suggest a "likely source" of income *not* to be reported.

The facts concerning the other fees relied upon by the Court below to establish a "likely source" of currency income are as follows: the fee from Dr. Jones, paid by checks, *was* recorded on the firm books and on the tax returns to the extent of $6000 (R. 320a)—only the portion ($1500) shown by the checks to have been contributed to charity was not so recorded or reported; the stock fee from Unexcelled Chemical Company ($2,997.50) *was* recorded both on the firm books and the tax returns (R. 301a)—the dispute was only as to whether it was reported in the proper year (R. 820a); the Glass & Lynch fees, paid by checks in two years prior to the indictment period, *were* recorded on the firm books and the tax returns in the years in which they were received (R. 297a, 299a), but apparently not in the proper amounts.

Since not a single one of the above items involved the receipt of *currency*, it is hard to see how they suffice as proof of a "likely source" of currency income, unless one agrees with the Second Circuit's determination in the *Ford* case that no likely source need be established.

That Court of Appeals in the instant case (Pet. App. 54) said "It would be far from strange if services of this character were paid for in cash", referring to petitioner's success in securing a speedy hearing for a client at the Bureau of Internal Revenue. This is tantamount to the position taken by the dissenting judge in *Massei* v. *United States:* that proof of a position on a police force, without more, is sufficient proof of a "likely source" of income in the form of graft. The Court of Appeals for the

Second Circuit in the instant case has held, in effect, that a lawyer who has occupied high Government office is in a position to render services of such a character that they *might* be paid for in currency, and that, despite the absence of any proof that he ever rendered such services or ever was paid in currency, the mere hypothetical possibility will suffice as proof of a "likely source" and will permit a finding that the currency deposited and expended by him was income.

WHEREFORE your petitioner respectfully prays this Court for a rehearing of its order denying a writ of certiorari herein.

The undersigned counsel for the petitioner certifies that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to grounds which are confined to intervening circumstances of substantial effect.

Respectfully submitted,

JOSEPH D. NUNAN, JR., *Petitioner,*

By RICHARD J. BURKE and
J. BERTRAM WEGMAN,
Counsel for Petitioner.